Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES M. BOYCE, Jr. and SHELLEY A. BOYCE,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do the rules of pleading allow a Plaintiff to take advantage of the affirmative defense of Res Judicata (Claim Preclusion) and prejudice a Defendant's Due Process Rights under Fed. R. Civ. P. 8(b-c) and 12(b)?

II. Does Tax Court Rule 90(f) preclude a Tax Court decision based solely upon admissions made pursuant to Tax Court Rule 90(c) from being used in a subsequent litigation to foreclose property?

III. Must a Defendant prove anything to obtain sanctions against a Plaintiff who has admitted destruction of evidence necessary to a "full defense?"

IV. What measure of proof does a taxpayer have to show to meet a "presumption of correctness" applied to IRS "Certificates of Assessments and Payments" and where does the burden ultimately lie to prove the amount of tax owed?

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PETITION FOR WRIT OF CERTIORARI

James M. Boyce, Jr. and Shelley A. Boyce respectfully petition, by and through counsel, for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case. Petitioners submit the District Court orders and judgment summarily affirmed by the Ninth Circuit egregiously misconstrued and misapplied the opinions and rules of this Court.

Petitioners submit *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1970); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *United States v. Mendoza*, 464 U.S. 154 (1984); *Mary Anna Rivet et al. v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), have established *res judicata* is exclusively an affirmative defense. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) have clearly established the duties of the court in summary judgment. This Court might well find it appropriate to order a summary reversal and remand, with directions for trial on the merits.

In addition, research has revealed no opinion from the Supreme Court regarding the spoliation of evidence doctrine articulated by then Judge Breyer in *Nation-wide Check Corp. v. Forest Hills Distributors Inc.*, 692 F.2d 214 (1st Cir. 1982) and applied by the Ninth Circuit in *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992). This case presents the question whether a defendant must show anything to obtain sanctions against a plaintiff who has admitted to destruction of evidence material to the defense.

OPINIONS BELOW

The Memorandum and Order of the Ninth Circuit Court of Appeals, entered June 12, 2002, App. 1-2, is unpublished. The Order of the Court of Appeals, denying Petitioners' request for rehearing and suggestion for rehearing en banc, entered September 3, 2002, App. 108-109, is unpublished. The three opinions of the District Court for Southern California, on partial summary judgment, entered March 22, 2000, App. 3-32, on reconsideration and/or clarification, entered May 19, 2000, App. 33-55, and on summary judgment, entered February 15, 2001, App. 56-107, are unpublished.

BASIS FOR JURISDICTION

The court of appeals affirmed the District Court on June 12, 2002, App. 1-2, and denied Petitioners' request for rehearing on September 3, 2002. App. 108-109. The Petitioners filed this petition within 90 days of the denial of rehearing, pursuant to Supreme Court Rule 13.1.

This petition poses questions of exceptional circumstances regarding the rules of pleading and summary judgment. All parties to judicial proceedings rely on the rules and upon this court's interpretation of them. Utmost in importance is assurance by the courts that the rules of pleading assure litigants the guarantees of due process and fair trials. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Constitution of the United States of America, First Amendment and Fifth Amendment are reproduced in the Appendix at App. 181.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading.

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of the averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is

true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments in the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting avoidance or affirmative defenses. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them is made independently would be sufficient, the pleading is not made insufficient by the insufficiency of the one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion; (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue,

(4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting defense numbered (6) to dismiss for failure of a pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

. . .

(c) Motion and Proceedings thereon. The motion shall be served at least 10 days

before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party moving is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

. . .

RULES OF THE UNITED STATES TAX COURT

Tax Court Rule 90(c) and (f)

. . .

(c) Response to Request: Each matter is deemed admitted unless, within 30 days after service of the request or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the requesting party (1) a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or (2) an objection, stating in detail the reasons therefor. The response shall be signed by the party or the party's counsel, and the original thereof, with proof of service on the other party, shall be filed with the Court. A denial shall fairly meet the substance of the requested admission, and, when good faith requires that a party qualify an answer or deny only a part of a matter, such party shall specify so much of it as is true and deny or qualify the remainder. An answering party may not give

lack of information or knowledge as a reason for failure to admit or deny unless such party states that such party has made reasonable inquiry and that the information known or readily obtainable by such party is insufficient to enable such party to admit or deny. A party who considers that a matter, of which an admission has been requested, presents a genuine issue for trial may not, on that ground alone, object to the request; such party may, subject to the provisions of paragraph (g) of this Rule, deny the matter or set forth reasons why such party cannot admit or deny it. An objection on the ground of relevance may be noted by any party but it is not to be regarded as just cause for refusal to admit or deny.

. . .

(f) Effect of Admission: Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or modification of the admission. Subject to any other orders made in the case by the Court, withdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the Court that the withdrawal or modification will prejudice such party in prosecuting such party's case or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by such party for any other purpose, nor may it be used against such party in any other proceeding.

. . .

STATEMENT OF THE CASE

The United States of America initiated this action "to reduce to judgment outstanding federal tax assessments made against defendant taxpayers" James Boyce in the amount of $290,761.96 and Shelley Boyce in the amount of $227,249.98, plus interest and statutory additions. The government also requested judgment it had valid liens against certain real property and for foreclosure upon the real property. The government made other claims regarding other Defendants that are not pertinent to this petition. App. 65-66.

The District Court had jurisdiction over the government's claims under 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. §§ 7402 and 7403.

The Petitioners' Amended Answer conceded liability in some amount but the correct amount needed to be determined by relevant and admissible evidence. In particular, the Petitioners alleged the government had collected amounts greater than it acknowledged and had assessed penalties based upon unadjudicated allegations of fraud.

The government initially moved for partial summary judgment as to its first and second requests for relief, asserting *inter alia*, a prior Tax Court decision was *res judicata* precluding the Petitioners from defending penalties assessed in connection with the allegations of fraud, App. 6-7. However, the government had not pled the Tax Court decision in the complaint as required by Civil Procedure Rule 8(a). Moreover, the Tax Court decision was based entirely upon admissions that are precluded from use in later proceedings under Tax Court Rule 90(f). App. 17. The District Court granted the Motion over the Petitioners' opposition, in spite of harboring some reservations

regarding government's claims and supporting authority, App. 115, and left the amount remaining due open for further discovery. App. 30-32.

After discovery, the government moved again for summary judgment on its first, second and third requests for relief. In consideration of the government's motion, the District Court refused to consider admissible evidence casting doubt on the accuracy of the government's calculations, App. 167-172, stating the Petitioners had produced it on the "eve of trial" and Petitioners' counsel had not examined a government witness about the evidence in deposition. App. 88-92. However, no trial date had been set, and the government witness had adamantly denied any specific recollection of the evidence.

The District Court also disregarded the government's admission it had destroyed evidence material to determination of the amounts collected, App. 92-96, and disregarded the Petitioners' assertion they had exhausted all other means by which to obtain the evidence, App. 173-174, stating the Petitioners had not demonstrated they were entitled to the evidence and had "not presented any admissible or persuasive evidence that undermines the accuracy of the Forms 4340." App. 96. However, the government witness had admitted in deposition the destroyed evidence would have contained facts material to the issues before the court.

Finally, the District Court disregarded inconsistencies within the government's evidence – i.e., some amounts awarded by the Tax Court were not correctly reflected in the Certificates, and the amounts assessed in the Certificates had no corresponding amounts in the IMFs and the IMFs indicated the statute of limitations had run on some

assessments – stating the Petitioners had not raised these issues in response to contention interrogatories, App. 83-88.

Relying upon a "presumption of correctness" judicially attached to the government's "Certificates of Assessments and Payments," App. 101, the District Court awarded judgment against the Petitioners in the total amount of $518,011.94, plus interest and statutory additions. Upon the default and stipulation of all other parties to the action but the State of California, the District Court declared the government had a valid lien upon the subject real property. App. 104-106, 179-80.

The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291, and summarily affirmed on June 2, 2002. App. 1-2. Petitioners timely filed for rehearing, which was denied on September 3, 2002. App. 108-109.

STATEMENT OF FACTS

Beginning in 1978 Petitioners attended meetings and conventions where speakers and handout literature alleged the IRS was wrongly interpreting and applying federal income tax laws. Petitioners understood the tax code is complex and difficult to interpret and obtained an attorney opinion letter that sustained many of these claims. They understood the First Amendment gave them the right to petition the IRS for explanation and clarification of their tax liability, but their petitions fell on deaf ears or were met with open hostility and threats. App. 97-101. Having nowhere else to turn for clarification, they did nothing.

In 1989 the IRS authorized a jeopardy assessment against the Petitioners. The primary basis for the action was the Petitioners' transfer of title to certain real estate to two trusts. Levies were executed on the Petitioners' bank accounts and business clients. However, until this action, no action, such as a quiet title action, was taken against the real estate.

The Petitioners requested administrative reconsideration of the determination of jeopardy, which request was timely filed by Petitioners but intentionally ignored by the IRS. App. 129. The government continued levying the Petitioners' bank accounts and clients until 1994, at which time the IRS agent allegedly deemed the account "uncollectible," closed the case and forwarded the collection case file to be destroyed. App. 93.

Also in 1989 the IRS issued statutory notices of deficiency for 1979-1984. The Petitioners, acting pro se and having been rebuffed in their earlier petitions to the IRS, challenged the underlying liability for the tax in Tax Court. Petitioners also sought an injunction on the levies pending review of the jeopardy assessment. The tax court refused to "look behind" the notices of deficiency and proceeded to redetermine the taxes owed by the Petitioners even though the Petitioners had not requested redetermination. In the end the Tax Court granted summary judgment in favor of the government on the basis of admissions made under Tax Court Rule 90(c). The Tax Court did not take into account the amounts collected through the levies, even though the IRS had been levying the Petitioners' assets throughout the proceedings. *James M. Boyce, Jr. & Shelley A. Boyce v. Commissioner,* T.C. Memo 1990-658.

The Petitioners appealed and the Ninth Circuit affirmed in an unpublished opinion. The matter remained essentially dormant until January 7, 1999 when the government initiated this matter in the District Court.

REASONS FOR GRANTING THE WRIT

Petitioners submit the Ninth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10.1(a).

Petitioners will show the reasoning behind the judgment appealed from seriously distorts established rules of pleading, discovery and summary judgment beyond recognition. All litigants must use, rely on and abide by those rules in bringing their causes before the courts. Even though this case has not been published, it is nonetheless publicly available over the internet through the PACER system, and at minimum is subject to word of mouth publicity. Moreover, if allowed to go unchallenged it may encourage similar unchecked abuses so long as they are shrouded in a veil of silence.

Petitioners submit the questions presented are generally settled in their favor, but the District Court and the Ninth Circuit decided the issues in favor of the government against established precedent. Finally, to the extent the questions are not settled they are matters of first impression, ripe and appropriately presented for consideration by this court.

RES JUDICATA IS EXCLUSIVELY AN AFFIRMATIVE DEFENSE, AND IS NOT AVAILABLE FOR OFFENSIVE USE.

The government was the plaintiff in this action, bringing forth its claims for relief as provided in Fed. R. Civ. P. 8(a). It was also the moving party in summary judgment under Fed. R. Civ. P. 56. The Petitioners were the defendants bringing forth defenses to the government's claims pursuant to Fed. R. Civ. P. 8(b-c) and 12(b). They were also the non-moving parties in the summary judgment proceedings.

Since at least 1937 the only pleadings allowed in civil actions before the federal courts are a complaint and answer; counter-claim and answer; third party claim and answer. Fed. R. Civ. P. 7(a). The claimant, counter-claimant and third party claimant are the parties to whom *claims* are customarily assigned, and who bear the ultimate burden of persuasion. Once an action is initiated by a *claim* the answering party is entitled to bring forth all *issues* in law and fact to refute, rebut or otherwise defend against the properly pled claims, Fed. R. Civ. P. 8(b-c) and 12(b). At trial, the plaintiff must establish a prima facie case; having once done so, the burden of going forward shifts to the defendant. E.g., *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 803 (1973). While the burden of going forward may shift at different stages of the proceedings, the burden of persuasion never leaves the claimant. Here, two months after the pleadings had closed by court order the government asserted, by motion for partial summary judgment, the prior Tax Court decision was *res judicata,* which precluded any defense on the amounts assessed upon the Petitioners. The government had not pled the Tax Court decision in its complaint.

Traditionally, *res judicata* has involved two facets: *claim preclusion,* relating to claims that could have or should have been brought in a prior case, and *issue preclusion,* relating to issues that have been *fully and fairly litigated* or *adjudicated* in another case. More recently, because the two doctrines operate differently, courts have taken to using the terms *claim preclusion* and *issue preclusion* to avoid confusion. *See, e.g., Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984).

The controlling Supreme Court opinions regarding *res judicata*: *C. I. R. v. Sunnen*, 333 U.S. 591 (1948); *Blonder-Tongue, supra; Parklane Hosiery, supra*; *United States v. Mendoza*, 464 U.S. 154 (1984); and *Mary Anna Rivet, supra;* all stand for the proposition *res judicata* is an affirmative defense to be raised under Fed. R. Civ. P. 8(c). Here, the Petitioners' Amended Answer contained no counter-claims or affirmative defenses; thus, the Petitioners had made no *claims* subject to preclusion. In addition, the government never disputed the prior Tax Court case had not been fully and fairly litigated and adjudicated; thus, there were no *issues* subject to preclusion. *Restatement (Second) of Judgments*, § 27 (1982).

At hearing on February 7, 2000 the District Court, by the Honorable Irma Gonzales, expressed its concerns regarding the plaintiff's motion:

> THE COURT: . . . TELL ME WHY THE GOVERNMENT HAD TO BRING THIS CASE IN THE FIRST PLACE, WHY THE DECISION IN THE TAX COURT AND THE NINTH CIRCUIT WEREN'T JUST DISPOSITIVE OF THE ISSUE OF THE CASE, AND WHY YOU HAD TO COME TO FEDERAL COURT.

App. 115.

In response, counsel for the government explained, enforcement of the assessments did not require a judgment, but the government wanted to enforce a lien on property with clouded title. At hearing on December 11, 2000, the District Court, now by the Honorable M. James Lorenz, expressed the same concerns:

> "THE COURT: LET ME ASK YOU WHY – JUST IF YOU KNOW; MAYBE YOU DON'T – WHY WAS THIS CASE – I UNDERSTAND WHAT COUNSEL SAID. BUT WHAT IS THE GOVERNMENT'S POSITION AS TO WHY IT GOES OVER SUCH A LONG PERIOD OF TIME? IT GOES BACK TO '91 OR BEFORE THAT."

App. 163.

Again, counsel for the government explained the government could enforce the assessments without adjudication, but it wanted to enforce a lien on property with clouded title. Obviously then, a judgment on the assessments was a prefatory *issue* to the object of the suit, foreclosure on real property. As will be shown in the following section, the importance of this distinction is significant.

Analyzing the government's motion, the District Court readily acknowledged: "'*Res judicata* is an affirmative defense ordinarily raised in the pleadings, Fed. R. Civ. P 8(c).' *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1970)." App. 17. Then the court reasoned: "Although there may have previously been some doubt, it is now clearly established that *res judicata* can also be raised by motion. . . . Moreover, it is not untimely for the government to raise *res judicata* after the pleadings are closed since the Ninth

Circuit has found that a trial court may, at any time, properly raise the question of *res judicata* on its own motion . . ." App. 18. The court concluded there is no requirement the government must raise *res judicata* in its complaint. App. 19.

None of the authorities cited by the District Court remove *res judicata* from the context of an affirmative defense. After four years in this litigation, Petitioners have found no authority supporting the offensive use of *res judicata*, which would operate to bar defenses against the plaintiff's claims. *Donald v. J. White Lumber Co.,* 68 F.2d 441 (5th Cir. 1934) held failure by the government to plead a Tax Court decision is deemed a waiver. Neither the government, District Court nor the Ninth Circuit acknowledged, explained or distinguished *Donald* despite the fact Petitioners raised it at every opportunity.

The District Court acknowledged: "[e]ven if there is no case wherein *res judicata* was used by a plaintiff except in defense to a counterclaim, as the Boyces argue, the unique procedural posture of this litigation alone does not prevent its application here." App. 41. To overcome the Petitioners' argument the District Court focused on the fact the same parties had been in the prior litigation and reasoned their current status as plaintiff or defendant was not dispositive. App. 41-44. The cases relied upon by the District Court for this rationale were all *issue preclusion* cases, not *claim preclusion* cases, and are therefore inapposite.

Aside from the direct conflict with *Donald, supra,* the problem the District Court's conclusion presented for the Petitioners is obvious. They were prevented from obtaining a full and fair adjudication of the merits on the assessments the government, *not the Petitioners*, brought to

the court for adjudication. The larger problem is, a plaintiff with the power to use *res judicata* offensively can elect to raise a prior decision at any time during the proceedings, or not raise it at all, thus placing the defendant at a significant disadvantage of not knowing what she is defending against until, possibly, the last moment. The prospects of undue harassment, uncertainty and harshness of the result are obvious.

Finally, the government demonstrated the absurdity of applying *res judicata* to the Tax Court decision in this case. The government admitted to the Ninth Circuit the Tax Court decision was merely an "element of proof" pertaining to its *claims*. Thus, the government had effectively conceded it was using the Tax Court decision to collaterally estop the Petitioners from defending against the assessments, which were not *claims* but *issues* pertaining to the object of the suit, enforcement of liens against certain real property. Petitioners raised this point to the Ninth Circuit, which ignored it.

TAX COURT RULE 90(F) PRECLUDES A TAX COURT DECISION BASED SOLELY UPON ADMISSIONS MADE PURSUANT TO TAX COURT RULE 90(C) FROM BEING USED IN A SUBSEQUENT LITIGATION

The District Court then turned to an analysis of the preclusive effect of a prior tax court decision based solely upon admissions. Tax Court Rule 90(f), supra, and *In re Cassidy*, 892 F.2d 637 (7th Cir.), *cert. den.*, 498 U.S. 812 (1990) both indicate giving preclusive effect to a judgment based solely on admissions, if not prohibited outright, would be harmful. In *Cassidy*, the Seventh Circuit reasoned admissions under Tax Court Rule 90(c) often reduce the burdens of litigation by eliminating the need for

discovery and narrowing the issues for trial. Litigants sometimes admit matters for reasons entirely unrelated to the claims before the court. Litigants are likely to rely upon the guarantees provided within Tax Court Rule 90(f) when responding to requests for admission. These rationales, it should be noted, apply equally whether *claim preclusion* or *issue preclusion* is under consideration.

Ignoring the plain prohibitory language of Tax Court Rule 90(f) and the persuasive rationale of the Seventh Circuit, the District Court reasoned *Cassidy* involved *issue preclusion* only and the government was raising *claim preclusion;* therefore *Cassidy* did not apply. App. 24. The District Court further reasoned a judgment based on deemed admissions was similar to a judgment based on default, and then concluded: "a judgment based on admissions is not a *per se* bar to the doctrine of *res judicata* as long as all other elements of *res judicata* are met." App. 25.

This conclusion, reached without citation to any conclusive authority, presumes a judgment based on admissions is actually similar to a judgment based on default. The policy reasons behind Tax Court Rule 90(c)(f), as articulated by the *Cassidy* court, and the policy reasons behind default judgments are simply not comparable. The Rule is designed to encourage narrowing of issues to the advantage of both parties and the court. Judgments based on default are designed to prevent dilatory defendants from impeding plaintiffs in establishing a judgment, but are not intended to provide advantage to plaintiffs. *See, e.g.*, 47 *Am.Jur.2d, Judgments*, § 1152.

The Tax Court decision is premised upon a claim related to a Notice of Deficiency, 26 U.S.C. § 6213, not upon a proceeding "to reduce to judgment outstanding

federal tax assessments," as this action was premised, 26 U.S.C. § 7403. The Tax Court in this case specifically held it had no jurisdiction over the jeopardy assessments being levied against the Petitioners while the matter was pending. Indeed, the government has no standing to raise claims relating to assessments in the Tax Court. Thus, it cannot be casually concluded the claims raised by the government here could have or should have been raised in the Tax Court or are subject to *res judicata*.

The government conceded to the Ninth Circuit, judgment on the assessments was merely an "element of proof" to its *claim* it had a valid lien upon real property. Therefore, Tax Court Rule 90(f) and *Cassidy* did apply to the Tax Court decision because the decision amounts to an *issue* in the government's claim for foreclosure. In misapplying the authorities of *preclusion,* the District Court converted *issue preclusion* to *claim preclusion* and effectively barred all of the Petitioners' otherwise available defenses. App. 20-31 and App. 45-53.

A DEFENDANT NEED NOT PROVE ANYTHING TO OBTAIN SANCTIONS AGAINST A PLAINTIFF WHO HAS ADMITTED DESTRUCTION OF EVIDENCE NECESSARY TO A "FULL DEFENSE."

The reviewing Ninth Circuit panel failed altogether to acknowledge the Petitioners had also raised issues to the District Court regarding the government's destruction of their Collections Case File. Petitioners had shown the IRS' established policy and procedure required retention of the file for ten years after any collection action, and that the last collection action had occurred in 1995. The government never disputed the file would have contained evidence necessary to the Petitioners' defense, i.e., the

government had collected amounts greater than its "Certificate of Assessments and Payments" (Certificates) acknowledged. The government never disputed Petitioners ***never*** had any way to acquire the documents necessary to show all the amounts collected through the government levies, except through access to the Collections Case File. In view of the government's admitted destruction of the evidence and the Petitioners' inability to prepare a "full defense" as a result, the Petitioners requested sanctions against the government, either by dismissing the action or by striking the Certificates from evidence, relying on *Unigard, supra*.

The District Court failed to enter any findings or conclusions upon the government's duty to maintain the Collections Case File or upon the uncontroverted fact the file was the only source of evidence to support a "full defense." App. 173-174. Relying on *Gentry v. United States*, 962 F.2d 555 (6th Cir. 1992), the District Court refused to sanction the government for its destruction of the Petitioners' Collection Case File, allegedly because the Petitioners had "not presented any admissible or persuasive evidence that undermines the accuracy of the Forms 4340." App. 96. *Gentry* held Treasury Regulations only required production of certain documents related to assessments. Here, the Petitioners were not seeking evidence of assessments; they were seeking evidence of payments. Neither the government nor the District Court cited any statute, regulation or case law holding a taxpayer is not entitled to his Collections Case File for this purpose, or a taxpayer must make any showing as to available evidence to obtain sanctions for destruction of evidence material and necessary to the defense. App. 93-96. The other cases upon which the court relied were

irrelevant to whether the Boyces had a right to the Collections Case File or whether the government was justified in destroying it.

Petitioners have found no opinion from the Supreme Court regarding the spoliation of evidence doctrine and are surprised it may be a matter of first impression. As articulated by then Judge Breyer in *Nation-wide Check Corp. v. Forest Hills Distributors Inc.*, 692 F.2d 214 (1st Cir. 1982),

> "[T]he evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the document."

Id., at 218.

This case presents the question whether a defendant must show anything to obtain sanctions against a plaintiff who has admitted to destruction of evidence material and necessary to the defense.

A TAXPAYER NEED ONLY SHOW EVIDENCE CASTING DOUBT UPON IRS CERTIFICATES OF ASSESSMENTS AND PAYMENTS TO OVERCOME ANY PRESUMPTION OF CORRECTNESS AND, REGARDLESS OF THE PRESUMPTION, THE BURDEN AT TRIAL STILL LIES WITH THE GOVERNMENT.

This case involves the unique interplay between the burdens imposed on the moving and non-moving parties in a summary judgment and a judicially created "presumption of correctness" attached to evidence produced by the

moving party. Petitioners found scant authority regarding the operation of presumptions within the summary judgment context, and less authority regarding scope of the "presumption of correctness" that attaches to "Certificates of Assessments and Payments." Petitioners suggest this is a matter of substantial significance reaching beyond this case.

Relying in part on *Celotex v. Catrett,* 477 U.S. 317 (1986), the government's second motion for summary judgment alleged certain "Certificates of Assessments and Payments" (Certificates) enjoyed a "presumption of correctness" under the rationale of *United States v. Janis,* 428 U.S. 433 (1976) and the Petitioners could not present any evidence to overcome that presumption. Aside from the purported *res judicata* effect of the prior Tax Court decision, the government relied on no other evidence.

The Petitioners responded, showing (1) bank transmittal receipts for which there were no corresponding entries on the Certificates, (2) Petitioners' personal testimony that the government had obtained at least twice as much on the levies as the government acknowledged, (3) the government had issued more levies for an aggregate total in excess of $5 million dollars, (4) entries on the Certificates that had no corresponding entries in the Tax Court judgment, and (5) entries on the Certificates that had no corresponding entries on the Petitioners' Individual Master Files, the undisputed "official" record of the Petitioners' tax accounts.

The District Court began its analysis by saying summary judgment is available on factually unsupported claims or defenses, citing *Celotex, supra,* and *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242 (1986). Continuing, the District Court reasoned:

> "The party moving for summary judgment bears the initial burden of establishing an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where the moving party for summary judgment **does not** bear the **burden of proof at trial**, it may show that no genuine issue of material fact exists by demonstrating that '**there is an absence of evidence to support the non-moving party's case**.' *Id.* at 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact, nor is it required to offer evidence negating the party's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Rather, 'the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied.' *Lujan*, 497 U.S. at 885 (*quoting Celotex*, 477 U.S. at 323.)" (Emphasis added).

App. 75.

The rule of *Celotex* does not apply to the case. The government was the plaintiff and the moving party for summary judgment. It bears the burden of proof at trial. The existence of a so-called "presumption of correctness" in favor of the moving party does not shift the burden of proof at trial.

Even though *Janis, supra,* imposes the burden of meeting a "presumption of correctness" upon the taxpayer, *see*, Fed. R. Ev. 301, there is nothing in that case that absolves a plaintiff of the fundamental duty to satisfy his

burden of persuasion to obtain a judgment. The *Janis* court acknowledged,

> "There appears, indeed, to be some debate among the Federal Courts of Appeals, in different factual contexts, as to the effect upon the burden of proof in a tax case when there is positive evidence that an assessment is incorrect. Some courts indicate that the burden of showing the amount of the deficiency then shifts to the Commissioner. Others hold that the burden of showing the correct amount of the tax remains with the taxpayer."

Janis, at 441-442. (footnotes omitted)

Rather than resolve the issue, the *Janis* court singled out the circumstance that applied to the case at hand – the IRS had assessed the taxpayer without showing a foundation – and upheld invalidation of the assessment. Since *Janis* was decided, as far as Petitioners are aware, the Supreme Court has not returned to this issue.

Here, the District Court excluded or refused to consider nearly all the evidence and arguments presented by the Petitioners as a sanction for purported complications that arose in the course of discovery and briefing on the government's motion. App. 83-92. Then the District Court absolved the government for its complete destruction of evidence necessary to a full defense. App. 92-96. Petitioners emphasize the District Court excluded Petitioners' evidence and refused to consider Petitioners' arguments essentially because it deemed them late, and offered on the "eve of trial." When the District Court said this, it was considering a motion for summary judgment brought by the government, and no trial date had been set. Summary

judgment proceedings are not to substitute for trials. *Anderson, supra.*

But when it came to the government's complete destruction of evidence the District Court held the Petitioners had not presented "persuasive" evidence to undermine evidence that enjoyed a judicial presumption; this, when all parties and the court knew the destroyed evidence could have rebutted and overcome the presumption! This arbitrary and capricious treatment of the Petitioners was both obvious and egregious.

It may be argued, the District Court had concluded even if the excluded evidence and arguments were admitted the Petitioners "have not presented any . . . ***persuasive*** evidence that raises a factual question regarding their tax liabilities . . ." App. 101. (emphasis added) This is in complete contrast to the rules of summary judgment. The Petitioners were the defendants and therefore never had the burden of ***persuasion***! The Petitioners' burden was to go forward against a summary judgment motion.

While the government may be entitled to a presumption on the evidence under *Janis*, that presumption does not negate the government's duty to show there were "no genuine issues of material fact" under Fed. R. Civ. P. 56(c). The government even admitted in its response brief before the Ninth Circuit the Petitioners needed only to present "evidence casting doubt" on the reliability of the Certificates to meet their burden.

The District Court relied on *United States v. Stonehill,* 702 F.2d 1288, 1293 (9th Cir. 1983) and several other cases for the proposition that the Certificates enjoy a "presumption of correctness" in ***all respects***. To the contrary, all of the cases cited by the District Court and the government hold the presumption extends ***only*** to the fact that "an

assessment was actually made." *See, e.g., Hughes v. United States,* 953 F.2d 531 (9th Cir. 1992). None of the cases involved a dispute over specific *amounts* within the Certificates or the quantum of evidence necessary to overcome the presumption.

As an aside, the Petitioners never denied assessments were made. In fact, they pointed out the Individual Master Files reflected some assessments that did not appear on the Certificates and for which the statute of limitations had run by the time this action was filed. More important, the Petitioners argued there was no case authority that the scope of the "presumption of correctness" extends to payments, and no authority the presumption prevails, over contrary evidence in the government's own records.

But the District Court ignored its own dictum – "[W]hen the moving party bears the burden of proof at trial, it cannot obtain summary judgment unless it presents evidence so compelling that no rational jury would fail to award judgment for the moving party. *See, e.g., Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1988)." App. 75 – and imposed a burden on the Petitioners to "raise" a factual issue. Rule 56 and the case authorities are clear, the Petitioners, as non-moving parties without the burden of proof at trial, need not "raise" anything; rather, their burden was to show the factual evidence offered by the government was not "compelling." Petitioners submit there is no way a court could conclude a rational jury that compared the Certificates to the bank transmittal receipts and heard testimony of witnesses that the IRS had issued dozens of levies to banks and Petitioners' business customers and further testimony that more than twice as much was collected by the IRS than it acknowledged would be "compelled" to find in favor of government.

Even if this court were to ignore the Petitioners' evidence (the bank transmittals, the additional levies for which there was no transmittal, the personal testimony of the Petitioners) it still had the Tax Court decision and the Petitioners' Individual Master Files properly in the record. The District Court excluded counsel's declaration and accompanying comparison tables for lack of authentication when they were properly admissible under Fed. R. Ev. 1006. Even without the tables it was obvious by simply placing the original documents side by side and comparing them that they were inconsistent.

Petitioners are at a complete loss to understand how it could be said there is no doubt a rational jury comparing the Certificates to the Individual Master Files, and hearing testimony of a government employee that the Certificates are prepared from information contained in the Individual Master Files, and seeing for themselves the Certificates reflect entries totaling $539,125.88 in excess of those shown on the IMF from which they were prepared, would find in favor of government. Neither can Petitioners understand how a rational jury would find the Certificates consistent with the Tax Court decision when the Certificates contained entries for alleged fraud penalties totaling tens of thousands of dollars more than the Tax Court decision.

The Petitioners more than met their burden of going forward. They produced substantially more than would create some "metaphysical doubt," *see*, *Matushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and a great deal more than the "mere scintilla" standard declared in *Anderson,* at 252. App. 139-166, 167-172, and 175-178. They demonstrated the Certificates were patently unreliable.

The District Court said in its order, "When ruling on a summary judgment motion, the court must examine all the evidence in the light most favorable to the non-moving party. *Id.* [citing to *Celotex*] The court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the jury. *Anderson,* 477 U.S. at 255." App. 76. Yet, it could not be clearer the court misconstrued the effect of the "presumption of correctness" and viewed the evidence in a light most favorable to the government (the moving party), contrary to *Celotex, supra,* and the overwhelming weight of authority related to summary judgment. Neither could it be any clearer that the court concluded the credibility of the witnesses, weighed the evidence, drew inferences from the facts and substituted summary judgment proceedings for a trial, contrary to this Court's opinion in *Anderson, supra,* and infringing upon the dominion of the jury.

CONCLUSION

For the foregoing reasons, Petitioners request this court to issue a writ of certiorari to review this matter, and ultimately to remand it with instructions to proceed to trial on the merits.

Dated: November 26, 2002

Respectfully Submitted:

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiffs-Appellee,

v.

JAMES M. BOYCE, sued individually and as trustee of the Jacob Family Preservation Trust, aka: The Jacob Family Trust and White Rail Company aka: James M. Boyce; SHELLEY A. BOYCE, sued individually and as trustee of the Jacob Family Preservation Trust, aka, The Jacob Family Trust and White Rail Company,

Defendants-Appellants,

and

THE JACOB FAMILY PRESERVATION TRUST, aka: Jacob Family Trust; WHITE RAIL COMPANY; NORTHERN PLAINS SERVICES; ROB TANNER, as trustee of the Jacob Family Preservation Trust, aka, Jacob Family Trust and The White

No. 01-55410

D.C. No.
CV-99-0003
MJL (LSP)

MEMORANDUM*

(Filed
Jun. 12, 2002)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Rail Company; LAND TITLE INSURANCE COMPANY; FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Defendants.

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Submitted March 12, 2002**
Pasadena, California

Before: **KOZINSKI** and **GOULD**, Circuit Judges, and **BREYER**, District Judge.***

Husband and wife James and Shelley Boyce ("the Boyces") appeal the district court's order reducing to judgment the Boyces' unpaid tax assessments. The Boyces claim the district court erroneously applied res judicata (claim preclusion) to a tax court judgment determining the Boyces' tax liabilities and erroneously determined on summary judgment the amount of tax liability to be reduced to judgment. We affirm for the reasons stated by the district court judges in their thorough and well-reasoned written orders.

AFFIRMED.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES M. BOYCE, JR., et al., Defendants.	CASE NO. 99-0003-IEG (POR) **ORDER (1) DENYING DEFENDANTS' MOTION TO CONTINUE AND (2) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** [Doc. Nos. 39, 46.] (Filed Mar. 22, 2000)

Presently before the Court is plaintiff's motion for partial summary judgment to reduce to judgment certain tax assessments against defendants James M. Boyce, Jr. and Shelley A. Boyce, (collectively "the Boyces"). Defendants have also filed a motion to continue the plaintiff's motion. For the reasons discussed below, the Court denies defendants' motion to continue and grants in part plaintiff's motion for partial summary judgment based on the doctrine of *res judicata*.

BACKGROUND

On January 7, 1999, plaintiff the United States of America (the "government") brought the above action

against multiple defendants to both reduce to judgment certain unpaid income tax assessments and to foreclose a federal tax lien against real property located at 577 Sleeping Indian Road in San Luis Rey, California (the "property"). (*See* Compl. at ¶¶13, 17 and 21.) On December 27, 1999, the government moved for partial summary judgment on the first and second causes of action. The facts and procedural history relevant to the instant motion, which pertains only to the Boyces, are described below.

1. Preliminary Facts

Unless otherwise noted, the following facts are undisputed. For the years 1979 to 1981, the Boyces, as husband and wife, jointly filed federal income tax returns without disclosing any financial information, (*see* Exhs. A, B, & C ("Pl.'s Exhs."),[1] Attach. to Pl.'s Mem. P. & A. In Supp. of Motion for Partial Summ. J. ("Pl .'s Mot. for Partial Summ. J.") (12/23/99)). Also, for the years 1982 to 1984, the Boyces failed to file any federal tax returns, (*see* Pl.'s Mot. for Partial Summ. J. at 2; Pl.'s Exhs. M, N, & P). Following an audit investigation, the Internal Revenue Service (the "IRS") issued notices of jeopardy assessments to the Boyces on January 19, 1989 regarding income taxes and

[1] Since both the plaintiff and the defendants have marked their respective exhibits with letters of the alphabet, the Court refers to them as Plaintiff's Exhibit ("Pl.'s Ex.") and Defendants' Exhibit ("Defs.' Ex."). All references to plaintiff's exhibits are to those attached to the Declaration of Henry C. Darmstadter in Support of Plaintiff's Motion for Partial Summary Judgment, while all references to defendants' exhibits are to those attached to Defendants' Opposition to Plaintiff's Motion.

the fraudulent conveyance of certain real property, (*see* Pl.'s Exhs. F & G). The IRS also issued Statutory Notices of Deficiency on March 17, 1989 regarding unpaid income taxes for the years 1979 to 1984, (*see* Pl.'s Exhs. D & E).

2. Procedural History

On April 10, 1999, the Boyces jointly petitioned the United States Tax Court (the "Tax Court") for a redetermination of the IRS's income tax deficiencies against them for the years 1979 to 1984 based on various constitutional and jurisdictional challenges. (*See* Pl.'s Ex. H.) When the IRS filed for summary judgment, the Boyces failed to file any objections to the pending motion on the merits. (*See* Pl.'s Ex. I, *Boyce v. Commissioner of IRS*, Doc. No. 6979-89, at *1-*2 (T.C.M. Dec. 31, 1990).) The Tax Court then "sustain[ed] the [IRS's] determinations contained in the notices of deficiency, including the additions to tax for fraud" and granted the IRS's motion for summary judgment in a Memorandum Opinion (T.C. Memo. 1990-658) issued on December 31, 1990, (*see id.* at *17). Subsequently, on January 4, 1991, the Tax Court issued an "Order and Decision" affirming the income tax deficiencies, as well as the additions for fraud and interest, against the Boyces as determined by the IRS in the Statutory Notices for Deficiency for the years 1979 to 1984, (*see* Pl.'s Ex. J, *Boyce v. Commissioner of IRS*, Docket No. 6979-89, at *2-*3 (T.C.M. Jan. 4, 1991)). The Tax Court also assessed a $5,000 penalty against each of the Boyces for instituting the Tax Court proceeding for frivolous or groundless reasons under 26 U.S.C. § 6673 or to cause delay, (*see id.* at *3).

The Boyces appealed the Tax Court's decision to the United States Court of Appeals for the Ninth Circuit. (*See* Pl.'s Ex. Q, *Boyce v. Commissioner of IRS,* No. 91-70269, at *1 (9th Cir. Feb. 19, 1992). In its unpublished Memorandum decision on February 19, 1992, the Ninth Circuit first noted that the Boyces failed to "challenge the merits of the deficiencies, additions, or penalties." (*See id.* at *2). Next, the Ninth Circuit found their contentions as to procedural and administrative errors on appeal as meritless as their "litany of frivolous tax protestor arguments to the tax court." (*See id.* at *3.) Finally, the Ninth Circuit affirmed the Tax Court's ruling against the Boyces, adding a $1,500 sanction for bringing a frivolous appeal. (*See id.* at *4 (*citing* Fed. R. App. P. 38; 28 U.S.C. § 1912) (citation to case omitted))).

3. Actions Giving Rise To This Litigation

Subsequently, nearly seven years later, on October 20, 1999, the IRS recalculated deficiencies against the Boyces for the years 1979 to 1984 in its Official Certificates of Assessments and Payments, also known as IRS Forms 4340. (*See generally* Pl.'s Exhs. K, L, M, N, O, & P (Certificates of Assessments and Payments ("IRS Form 4340")).) The IRS Forms 4340 incorporate the additions for fraud and penalties as per the Tax Court's Order and Decision, and credit partial abatements to Shelley Boyce's jeopardy assessments for the years 1980 to 1984. It is to reduce these final income tax assessments against the Boyces to judgment that the government filed this action on January 7, 1999.

On December 23, 1999, the government moved for partial summary judgment against the Boyces on the first

and second claims pursuant to Federal Rule of Civil Procedure 56(c) on the basis of (1) the *res judicata* effect of the Tax Court's decision as to the Boyces' tax liability, or, in the alternative, (2) the legal presumption of correctness that attaches to the IRS Forms 4340 with respect to the Boyces' tax liability to date. (*See generally* Pl.'s Mot. for Partial Summ. J.) On January 24, 2000, the Boyces filed their opposition to the government's motion, and simultaneously moving to continue the governments' motion to pursue additional discovery pursuant to Rule 56(f). (*See* Defs.' Opp'n. (1/24/00); Defs.' Mot. for Continuance (1/24/00).) On February 1, 2000, the government filed its reply to the defendants' opposition, in which it also opposed a continuance by agreeing to limit the scope of its partial summary judgment motion to the purely legal issue of *res judicata* which can be decided without further discovery.

At the hearing on February 7, 2000, both parties represented their amenability to proceed solely on the *res judicata* issue, but professed that they could not separate the coextensive issues to the satisfaction of both counsel. Specifically, the parties were unable to separate the issue of the *res judicata* effect of the Tax Court's Decision from the issue of alleged errors in that decision. Also, the Boyces challenge the government's failure to account for assessments levied pursuant to the Notice of Jeopardy Assessments in the Forms 4340. As a result, the Court requested supplemental briefing regarding the relationship of the Statutory Notice of Deficiency, the Notice of Jeopardy Assessments, and the Forms 4340 on one hand to the Tax Court's Decision regarding the Boyces tax liability on the other. (*See Order Requiring Supp. Briefing With Respect to Pl.'s Mot. for Partial Summ. J. & Def.'s*

Mot. for Cont. (2/8/00) ("*Supplement Briefing Order*") at 1-2.)

Based on the parties' respective arguments in their briefs and at the hearing on February 7, 2000, as well as the parties' responses to the Court's *Supplemental Briefing Order,* the Court now addresses the defendants' motion for a continuance and plaintiff's motion for partial summary judgment in turn.

DISCUSSION

I. APPLICABLE LAW

A. MOTION TO CONTINUE HEARING

When "an act is required or allowed to be done at or within a specified time," the Court has the authority, "for cause shown . . . (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed. . . . " Fed. R. Civ. P. 6(b). A request for continuance of a motion for summary judgment by a party opposing summary judgment, as here, may be granted under Rule 56(f), which provides, in pertinent part:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may . . . order a continuance to permit . . . discovery to be had. . . .

Fed. R. Civ. P. 56(f); *see also Anderson v., Liberty Lobby, Inc.,* 477 U.S. 242, 250 n. 5 (1986) (holding that a party opposing a motion for summary judgment must be allowed

the opportunity to discover essential information to develop its claims or oppositions).

B. Motion For Summary Judgment

Summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is a question which must be answered to determine the rights of the parties under the substantive law and must be answered by the jury. *See Anderson v. Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir. 1993). A dispute is "genuine" only if "a jury applying [the substantive law's] evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson,* 477 U.S. at 255.

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *See United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex,* 477 U.S. at 323. To satisfy this burden, the moving party must demonstrate that no genuine issue of material fact exists for trial. *See id.* at 322. However, the moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *See*

id. at 323. Once the moving party demonstrates that there is no genuine issue of material fact, the non-moving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (*quoting* Fed. R. Civ. P. 56(e)).

II. ANALYSIS

A. DEFENDANT'S MOTION TO CONTINUE

The Boyces request a continuance of the hearing on the government's motion for partial summary judgment, an extension of time to file their opposition to the same, or leave to present evidence at oral argument. (*See* Defs.' Mot. for Continuance at 1-2.) All of the preceding requests are based on the Boyces' current theory of the case – i.e, that they admittedly owe taxes for the years in question, but that the government has not properly credited them for money seized pursuant to the Notice of Jeopardy Assessments in 1989, (*see* Pl.'s Ex. F-G), and has improperly added penalties and interest to the taxes owed in the IRS Forms 4340, (*see* Pl.'s Exhs. K-P).[2] (*See generally* Defs.' Mot. for Continuance at 2-3.) In its reply, the government does not oppose the Boyces' request for a continuance with respect to challenges to the Forms 4340, but insists that

[2] Noting that they are undergoing substantial difficulty in reviewing a number of the voluminous records provided by the government in discovery in order to determine the exact amount that they owe, (*see* Decl. of Richard Shepard ("Shepard Decl.") (1/26/00) at 2-3); Decl. of Karen Kahuhu ("Kahuhu Decl.") (1/26/00) at ¶3)), the Boyces argue that this process will be foreclosed by the government's assertion of the *res judicata* effect of the 1990 Tax Court decision in its motion for partial summary judgment. (*See id.*)

the Court determine whether the Tax Court's Decision is *res judicata* to the issue of the IRS's assessments against the Boyces. (*See* Pl.'s Reply at 3) (noting that the government "agrees that its motion for partial summary judgment be limited to an adjudication as to the *res judicata* effect of the Tax Court decision.")

Thus, the parties seem to agree that the Court should adjudicate the government's motion with respect to the *res judicata* issue at this time, *as long as* the Boyces can continue discovery and challenge the amount of their tax liability at a later date.[3] The only issue to be decided before proceeding to the merits of plaintiff's motion, then, is whether the legal analysis on the *res judicata* issue can be satisfactorily confined to allow subsequent challenges to those underlying factual disputes – based on IRS Forms 4340 and the Notices of Jeopardy Assessments – which require resolution through continuing discovery. (*See* Defs.' Mot. for Continuance at 2-3 (noting the Boyces' challenge to the accuracy of the IRS Forms 4340 and errors with

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[3] The government's consent is clear in its reply; for their part, the Boyces' is evidenced by various facts. For example, the government points to the representation by the Boyces' counsel, made after the request for a continuance was filed, that he does not oppose the motion for partial summary judgment as to the *res judicata* issue alone, (*see* Decl. of Harry Darmstadter ("Darmstadter Decl.") (2/1/00) at ¶¶9-10), if the remaining issues will survive for a resolution after the completion of discovery. Also, the Boyces adopted the same position at the hearing on February 7, 2000, which is consistent with the expression of their previous concern on how to separate the legal and factual challenges. (*See* Shepard Decl. at 3-4 (noting the problem of how "to allow the court to decide the enforceability of the 1990 tax court decision while leaving open the questions regarding reliability and relevance of the Forms 4340 and other documentary evidence of the assessments, additions, and payments.").)

respect to the Notices of Jeopardy Assessments as going to the "core of the question of what the Boyces owe,").) For the reasons discussed below, the Court finds that the Boyces' challenges to the IRS Forms 4340 be separated in precisely such a fashion, while their challenges to the Notices of Jeopardy Assessments are moot.

(i) Certificates of Assessments and Payments or Forms 4340

The Boyces argue that the Certificates of Assessment and Payments or the "1999 Forms 4340" issued by the IRS after the Tax Court's judgment (*see* Pl.'s Ex. K-P) incorrectly show credits of only $39,409.02, whereas the Boyces allege that the government recovered nearly $85,000 owed by the Boyces. (*See* Defs.' Mot. for Continuance at 2; Defs.' Sep. Statement of Disputed Facts at ¶¶ 7-12 (citations to defendants' exhibits omitted).) In light of the government's agreement to allow the Boyces to challenge the authenticity, accuracy, and completeness of the Forms 4340 at a later date,[4] the Court finds that this issue can be bifurcated from the *res judicata* issue on summary judgment without the need for a continuance.[5]

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[4] (*See* Pl.'s Supp. Brief (2/17/00) at 2 ("[T]he Boyces should be entitled in this action to challenge the presumption of correctness of the Certificates of Assessments and Payments (IRS Form 4340) as to the amount of payments or credits made on the liability.") (footnote omitted).)

[5] The Court also notes that even if the government did not consent to such a separation, the Boyces' challenges to the Forms 4340 necessarily survives a resolution of the *res judicata* issue insofar as they concern the IRS's errors in generating them *after* the Tax Court's decision on the merits. In fact, at oral argument and in its supplemental briefing, the government acknowledges that even if the Court were

(Continued on following page)

(ii) The Notices of Jeopardy Assessment from January 19, 1989

Next, the Boyces argue that if the Tax Court's Decision is found to have *res judicata* effect, the $12,933.00 discrepancy in their tax liability between the amounts noted in the Notices of Deficiency and the Notices of Jeopardy Assessment will not be resolved, (*see* Defs.' Mot. for Continuance at 4); and this Court will ratify errors by both the IRS and the Tax Court regarding the Notices of Jeopardy Assessments. However, the Boyces' argument fails in three key regards.

First, as the government explains, the discrepancy between the Notices of Deficiency and the Notices of Jeopardy Assessments is necessitated by the nature of the two documents. This is because the Statutory Notices of Deficiency reflect the "total amount of tax and other additions which, after audit, the IRS calculated the Boyces owed for the years 1979-1984," (Pl.'s Supp. Brief at 2), while the Notices of Jeopardy Assessment only reflect that "portion of the liability against the Boyces" which was collected to end the Boyces' suspected attempts to transfer and conceal their property to avoid tax collection. (*See* Pl.'s Mot. for Partial Summ. J. at 4 n.3); *see also* 26 U.S.C. § 6861 (authorizing the IRS to immediately assess an income tax deficiency if it believes collection of the tax will be jeopardized by delay and to do so prior to issuance of

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to find that the Tax Court Decision has *res judicata* effect, the Boyces would not be precluded from challenging the Forms 4340 since "there are payments reflected on the Forms 4340 that were made *after* the Tax Court's Decision became final." (Defs.' Supp. Brief at 2 n. 2 (emphasis added).)

the Statutory Notice of Deficiency under 26 U.S.C. § 6213). Thus, levies pursuant to the Notices of Jeopardy Assessments necessarily reflect amounts different from the total tax liability summarized in the Notices of Deficiency, which is not an error that needs to be resolved. *See* Michael I. Saltzman, IRS Practice and Procedure ¶10.05[2] (2d ed. 1991) (explaining the nature of a jeopardy assessment as a provisional remedies [sic] during the pendency of a Tax Court proceeding).

Second, the Boyces remaining challenges to the Notices of Jeopardy Assessments are moot, because the alleged errors by the IRS and the Tax Court were not errors. For example, the Boyces argue that the IRS failed to notify the Tax Court of the Jeopardy Assessments pursuant to 26 U.S.C. § 6861 so that it could be taken into account in determining the amount of the Boyces' deficiency. However, the IRS had no obligation to notify the Tax Court of the Jeopardy Assessments, and therefore, there is no error by the IRS for the Boyces *to* challenge. Although the IRS must notify the Tax Court of the making of jeopardy assessments after the Notices of Deficiency are issued, *see* 28 U.S.C. § 6861(c), it has no such duty if, as here, the jeopardy assessments are made prior to the Notices of Deficiency being issued. This is because any preceding jeopardy assessments are already reflected in the amount of the subject debt listed in the Notices of Deficiency, while any subsequent assessments are necessarily excluded from the Notices of Deficiency that have already been issued and must be reported to the Tax Court so it can determine the correctness of their amount. *See id.; see also* Saltzman at ¶10.05[2][b][i].

Likewise, the next error alleged by the Boyces – the Tax Court's failure to account for the IRS's levies pursuant

to the Notices of Jeopardy Assessments in arriving at its decision – is meritless. This is because the Tax Court had no reason to address the amounts already collected by levy since its only function was to redetermine whether the amounts set forth in the Statutory Notices of Deficiency issued by the IRS accurately represented the Boyces' tax liability. *See* 26 U.S.C. § 6214(a); Saltzman, *IRS Practice and Procedure* at ¶1.05[2][b]. Moreover, the Tax Court's Decision necessarily included a determination of the amounts collected pursuant to jeopardy assessments as well as a determination of the total amount of the deficiency,[6] even if the jeopardy assessments were not alleged in the Boyces' petition or the IRS's answer because the Notices of Deficiency summarized the amounts levied by the IRS pursuant to the Jeopardy Assessments, (*see* Pl.'s Exhs. D & E). Thus, instead of being inconsistent with the definition of a "deficiency" as the "amount by which the tax imposed . . . exceeds . . . the amounts previously assessed," 26 U.S.C. § 6211(a), the Tax Court's Decision allowed the IRS to generate Forms 4340 which purport to accurately reflect the taxes owed by the Boyces, as adjusted by any amounts previously assessed. Since the Boyces' challenge to these IRS Forms 4340 will survive a resolution of the *res judicata* issue, as noted above, the

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[6] (*See* Pl.'s Ex. I, *Boyce v. Commissioner of IRS*, No. 6979-89 at *2 ("The issue . . . is whether petitioners, as a matter of law, should be found liable for *the tax deficiencies and additions to tax* as determined by respondent [Commissioner of IRS] in the deficiency notices.") (emphasis added)); *see also id.* at *17) (sustaining the IRS's "determinations contained in the notices of deficiency, including the additions to tax for fraud" based on which "[a]n appropriate order and decision" was entered) (emphasis added))

amounts of the jeopardy assessments and the jeopardy nature of the assessments are essentially moot.

In sum, the Boyces' challenge to the Notices of Jeopardy Assessments lack merit. It follows, then, that no further discovery is required to allow the Boyces to support their arguments regarding the Notices of Jeopardy Assessments, and that any issues regarding assessments need not affect this Court's adjudication of the government's request for partial summary judgment.

Accordingly, the Court **DENIES** the defendants' motion for a continuance of the government's motion for partial summary judgment.

B. Plaintiff's Motion For Partial Summary Judgment

The Court now turns to the government's motion for partial summary judgment with respect to its first claim for relief against James Boyce, Jr. and its second claim for relief against Shelley Boyce. Specifically, the government requests that the Court reduce to judgment income tax assessments totaling $290,761.96 against James Boyce and $227,249.98 against Shelley Boyce, as alleged in the first and second claims for relief, respectively. (*See* Compl. at ¶¶14-17 (first cause of action against James Boyce) and ¶¶18-21 (second cause of action against Shelley Boyce).) The government makes two alternative arguments. First, it argues that by producing the Official Certificates of Assessment and Payments or IRS Forms 4340, it has met its burden of proof that no genuine issue of material fact exists as to the amount of the Boyces' tax liability. (*See* Pl.'s Mot. for Partial Summ. J. at 9-10.) However, as noted above, the government has agreed to limit this motion for

summary judgment to the legal issue of the *res judicata* effect of the Tax Court's previous decision. Accordingly, the Court now turns to the government's alternative argument in support of its motion for partial summary judgment.

Irrespective of the presumptive correctness of the amount of the Boyces tax liability in the IRS Forms 4340, the government argues that the Tax Court's Order and Decision in 1990, as affirmed by the Ninth Circuit, is *res judicata* regarding the IRS's assessment of the Boyces' tax liabilities for the years 1979 to 1984. Therefore, the government argues that there is no genuine issue of material fact as to the validity of the IRS's assessments against the Boyces in its Statutory Notices of Deficiency. In opposition, the defendants first challenge the government's failure to plead *res judicata* in its complaint (*see* Defs.' Opp'n. at 2-3). Second, the defendants argue that regardless, the Tax Court's judgment is not *res judicata* because it was based on the Boyces' failure to answer requests for admissions advanced by the government, which the Tax Court construed as true pursuant to Tax Court Rule 90(c), and which cannot be given preclusive effect. (*See id.* at 3-4 (*citing* Tax Court Rule 90(f) (prohibiting the use of admissions made by a party under the Rule for any purpose outside the Tax Court) and *In re Cassidy*, 892 F.2d 637 (7th Cir. 1990) (holding that "it would be harmful to give preclusive effect to a judgment based solely on an admission.").) The Court considers each argument in turn.

(i) Propriety of Raising Res Judicata for The First Time on Motion

Res judicata is an affirmative defense ordinarily raised in the pleadings, Fed. R. Civ. P. 8(c), the purpose of

which is to give the opposing party notice of the claims and defenses and a chance to argue why its imposition would be inappropriate. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 350 (1970). Although there may have previously been some doubt, it is now clearly established that *res judicata* can also be raised by motion. *Larter & Sons, Inc. v. Dinkler Hotels Co.,* 199 F.2d 854, 855 (5th Cir. 1952) (case disposed of upon a motion to dismiss raising *res judicata*); *Hadden v. United States*, 105 F. Supp. 1010 (Ct. Cl. 1952) (*res judicata* raised by plaintiff on motion for summary judgment); *Kachler v. Taylor,* 849 F. Supp. 1503, 1515 (M.D. Ala. 1994) ("Although Rule 8(c) includes *res judicata* and collateral estoppel on the list of affirmative defenses that must be pleaded specifically by answer, these defenses may be raised for the first time on a motion for summary judgment."); *see also* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1277 (1990).

Moreover, it is not untimely for the government to raise *res judicata* after the pleadings are closed since the Ninth Circuit has found that a trial court may, at any time, properly raise the question of *res judicata* on its own motion to ensure the finality of decisions, conserve judicial resources, and protect litigants from multiple lawsuits. *See McClain v. Apodaca,* 793 F.2d 1031, 1032-33 (9th Cir. 1986). This is especially true given that one of the main purposes of *res judicata* is to prevent the prevailing party, here the government, from vexatious litigation and inconsistent judgments. *See Magnus Electronics, Inc. v. La Republica Argentina,* 830 F.2d 1396, 1403 (7th Cir. 1987) ("Res judicata protects a victorious party from being dragged into court time and time again by the same opponent on the same cause of action.") (citation omitted).

Further, since a motion for summary judgment can be used to dispose of all or any part of the opposing party's claims or defenses, *see* Fed. R. Civ. P. 56(a) & (b), and dispose of claims or defenses which turn solely on issues of law, *see Schneider v. TRW, Inc.*, 938 F.2d 986, 991 (9th Cir. 1991), the government's advancement of *res judicata* for the first time in its motion for summary judgment is appropriate to dispose of the Boyces' defense that they "have never been expressly made liable for the alleged federal taxes asserted in the United States of America's complaint." (*See* Boyces' Answer (1/26/99) at ¶¶ 49-50.) Finally, since the government notes, and the Boyces do not dispute, that its position on the *res judicata* issue has been well known by all the parties, there is little concern that the Boyces did not have fair notice based on the government's failure to plead *res judicata* in its complaint.

Therefore, the Court finds that there is neither any requirement that a plaintiff must plead *res judicata* in the complaint nor is there any showing by the Boyces of prejudice resulting from the government's advancement of *res judicata* for the first time in the instant motion. Accordingly, the Court turns to the Boyces' substantive challenge to the government's argument that the Tax Courts decision is *res judicata* regarding the IRS's tax assessments against them.

(ii) The Res Judicata Effect of Tax Court Judgment Based on Admissions Under Tax Court Rule 90(c)

Neither party disputes that, as provided under Tax Court Rule 90(c),[7] the Tax Court arrived at its decision by accepting as true allegations made in the government's request for admission, to which the Boyces' failed to respond. However, the parties dispute the preclusive effect to be given such a judgment and rely on different interpretations of the Seventh Circuit's decision in *In re Cassidy*, 892 F.2d 637 (7th Cir.), *cert. denied,* 498 U.S. 812 (1990). The defendants argue that in *In re Cassidy,* the Seventh Circuit held that since Rule 90(f) prohibits the use of any admissions made by a party in any other proceeding, the Bankruptcy Court should not have given preclusive effect to a previous Tax Court decision based on admissions under Tax Court Rule 90(c). (*See* Defs.' Opp'n. at 3 (citations omitted).) The government argues, however, that the Seventh Circuit distinguished between *res judicata* (or claim preclusion) and collateral estoppel (or issue preclusion), and that as long as the requirements of *res judicata* are met – a final judgment on the merits in a court of competent jurisdiction and between the same parties on the same cause of action – even a judgment based on admissions can be *res judicata,* notwithstanding the prohibition in Tax Court Rule 90(f).[8] (*See* Pl.'s Reply

[7] Tax Court Rule 90 is recognized as the equivalent of Federal Rule of Civil Procedure 36. *See* 4A Moore et al., *Moore's Federal Practice* ¶ 36.08, at 36-82 (2d ed. 1994).

[8] Tax Court Rule 90(f) provides that "[a]ny admission made by a party under this Rule is for the purpose of the pending action only and

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(1/31/00) at 4-6.) The Court first addresses the parties' divergent interpretation of the dispositive case on the matter – *In re Cassidy* – and then determines whether the requirements of *res judicata* are met here.

(a) Factual Background and Holding of *In re Cassidy*

The facts surrounding the Seventh Circuit's decision in *In re Cassidy* are as follows. When the IRS issued a Statutory Notice of Deficiency to Cassidy for filing fraudulent tax returns for the years 1974 and 1975, Cassidy challenged the deficiency in the United States Tax Court. *See id.*, 892 F.2d at 638. Before that case came to trial, an involuntary bankruptcy petition was filed against Cassidy, pursuant to which the Tax Court proceedings were automatically stayed. *See id.* (citing 11 U.S.C. § 362(a)). Once the Bankruptcy Court discharged Cassidy from all dischargeable debts on March 13, 1984, it lifted the stay to allow the Tax Court proceeding to go forward. *Id.*

In the Tax Court proceeding, Cassidy was uncooperative, including but not limited to his failure to respond to the IRS's Request to Admit within the required thirty days under Tax Court Rule 90. *Id.* Under Rule 90(c), the Tax Court therefore deemed as admitted all matters asserted in the Request to Admit, including the fact that Cassidy filed fraudulent federal income tax returns for the years at issue. *Id.* at 639. After denying Cassidy's motion for dismissal or summary judgment, and rejecting Cassidy's

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is not an admission by such party for any other purpose, nor may it be used against such party in any other proceeding."

claim that his failure to respond to the Requests to Admit was excusable, the Tax Court upheld the deficiencies and additions to tax for fraud as stated by the IRS based on the Rule 90(c) admissions. *Id.* Cassidy appealed the Tax Courts ruling concerning the Request to Admit to the Seventh Circuit, and also argued that the entire debt was discharged in the bankruptcy proceeding. *Id.* (*citing Cassidy v. Commissioner*, 814 F.2d 477 (7th Cir. 1987) (*Cassidy I*)). The Seventh Circuit affirmed the Tax Court's judgment, and found that the tax debt and fraud penalties were not dischargeable in bankruptcy. *Id.*

Subsequently, Cassidy filed a complaint in the Bankruptcy Court to determine the dischargeability of the tax liability under Bankruptcy Rule 4007. *Id.* While the IRS argued that the Seventh Circuit's determination of the dischargeability issue precluded Cassidy's complaint, Cassidy contended that the Seventh Circuit's comments on dischargeability were pure dicta since the Tax Court had no jurisdiction to consider the dischargeability issue. *Id.* The Bankruptcy Court agreed with the IRS, and granted the Commissioner's motion to dismiss Cassidy's complaint based on the res judicata effect of the Seventh Circuit's decision in *Cassidy I*. *Id.* Cassidy then appealed to the district court. *Id.*

On appeal to the district court, the parties advanced the same arguments. *Id.* instead of finding that Cassidy was barred by the Seventh Circuit's view of dischargeability under *res judicata,* the district court held that the factual finding of fraud by the Tax Court barred Cassidy's bankruptcy proceeding under collateral estoppel. *Id.* Cassidy then appealed to the Seventh Circuit, raising the same contentions as in the court below. *Id.* In this second appeal, the Seventh Circuit distinguished the two issues

in front of it: (1) whether the district court correctly held that the Tax Court's factual finding collaterally estopped Cassidy's contrary assertion that his tax liabilities were dischargeable in bankruptcy court, and (2) whether its own ruling in *Cassidy I* barred Cassidy's dischargeability litigation under *res judicata*. *Id.* at 640. The Seventh Circuit then went on to hold as follows: (1) the district court erred in finding that Cassidy was collaterally estopped by the previous litigation in Tax Court because the bankruptcy court could not rely on the factual finding of the Tax Court when it was based solely on admissions and prohibited by Rule 90(f), *see id.;* and (2) that *Cassidy I* did not have *res judicata* effect because the Tax Court had no jurisdiction to consider whether Cassidy's tax debt was dischargeable in bankruptcy and therefore, the Seventh's Circuit's statement regarding dischargeability was dicta, and not a judgment "necessary to the decision," *see id.* (citations omitted).

Therefore, contrary to the defendants' assertion, the Seventh Circuit's explanation that "a judgment based solely on admissions under Tax Court Rule 90 (or Fed. R. Civ. P. 36) cannot be used to estop relitigation of a factual question in a later proceeding;" (*see id.,* n.1) stands only for the proposition that parties in one action are estopped in another action from relitigating issues that were actually litigated previously, and not just those issue which could have been litigated. *See Kremer v. Chemical Constr. Corp.,* 456 U.S. 461 n. 6 (1982); *accord Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322, 326 (1955); *Baker by Thomas v. General Motors Corp.,* 522 U.S. 222, ___ n. 5 (1998) (describing differences between *res judicata* and collateral estoppel). This explains why the Seventh Circuit underwent a thorough examination of whether judgments

similar to those based on admissions – *i.e.* default judgments, judgments based on stipulated facts, consent judgments on the factual issues – could satisfy, the "actually litigated" requirement of collateral estoppel. *See In re Cassidy*, 892 F.2d at 640, n.1.

Thus, the Seventh Circuit did not decide the issue presented here – whether a judgment based on admissions can be given *res judicata* effect.[9] Instead, the Seventh Circuit held that the only reason that *Cassidy I* was not *res judicata* in the bankruptcy proceeding was because the Tax Court's lack of jurisdiction to consider dischargeability. *Id.* at 640. This is consistent with the fact that *res judicata* applies to judgments analogous to those based on admissions, such as default judgments and stipulated

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[9] Admittedly, it is recognized that rules governing requests for admission are designed to reduce the burden of litigation by eliminating undisputed facts and narrowing the issues for trial. *See General Accident Fire & Life Assur. Corp. v. Cohen*, 203 Va. 810, 813 (1962) (discussing state rule on admissions); Fed. R. Civ. P. 36 advisory committee's note; *see also TransiLift Equip., Ltd. v. Cunningham*, 234 Va. 84, 90 (1987) ("Rule 4:11 is virtually identical to Rule 36 of the Federal Rules of Civil Procedure."); 4A Moore et al., *Moore's Federal Practice* ¶ 36.08, at 36-82 (2d ed. 1994) (discussing Fed. R. Civ. P. 36, which is equivalent to Tax Court Rule 90). Since giving admissions binding effect beyond pending litigation discourages admissions, the Seventh Circuit in *In re Cassidy* held that policy concerns also prevented collateral estoppel from being applied to a judgment based on admissions. Although the same concerns arise in the context of res judicata, they must be balanced with the recognized policy interests behind res judicata – i.e. the finality of judgment, the reduction of vexatious litigation, and the interests of judicial economy. Moreover, the fact that res judicata principles allow preclusive effect on all issues that were or could have been raised supports the conclusion that the policies behind such rules as Tax Court Rule 90 and Federal Rule of Civil Procedure 36 should not undermine the applicability of res judicata.

settlements, whereas collateral estoppel, does not. *See* 18 James W. Moore, *Moore's Federal Practice*, § 131.30[3][c] & [3][d] (3d ed. 1999); *In re Baker,* 74 F.3d 906 (9th Cir. 1996) (holding that res judicata, applied to a default judgment on the taxpayer's liabilities for unpaid taxes in tax court); *United States v. Bodwell,* 96-2 U.S.T.C. ¶ 50,592 (E.D. Cal. 1996) (holding that res judicata prevented the taxpayer from relitigating his tax liabilities in district court even where taxpayer's previous action challenging tax deficiencies and penalties in tax court was dismissed due to failure to prosecute); *United States v. Bryant*, 15 F.3d 756 (8th Cir. 1994); *United States v. Langer*, 902 F. Supp. 999 (D. Minn. 1995); *United States v. Hansel*, 999 F. Supp. 694 (N.D.N.Y. 1998).[10]

Accordingly, the Court finds that a judgment based on admissions is not a *per se* bar to the doctrine of *res judicata* as long as all other elements of *res judicata* are met.

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[10] To the extent that defendants cite *In re Cassidy* for the proposition that judgments based on admissions under Tax Court Rule 90(c) can have no preclusive effect, they fail to distinguish between claim preclusion and issue preclusion, a confusion caused by the frequent use of the term "res judicata" to encompass both. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (explaining that while *res judicata* may be used by some courts to encompass both claim preclusion and issue preclusion, the two are separate doctrines, and more precise terminology clarifies any confusion); *Faust v. U.S.*, 101 F.3d 675, 677 (Fed. Cir.), *cert denied* 117 S.Ct. 1560, ___ U.S. ___ (1996). (explaining ambiguity that sometimes underlies the term "res judicata").

(b) Requirements of Res Judicata as Applied to The Tax Court's Decision

Established primarily to avoid repetitive litigation of the same causes of action, *see Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948), the doctrine of *res judicata* directs that a prior judgment constitutes a bar to a subsequent action (1) between the same parties (2) when the claims and the facts surrounding the two causes of action are substantially coextensive, and (3) the prior judgment was final, on the merits, and in a court of competent jurisdiction, *see Expert Electric. Inc. v. Levine,* 554 F.2d 1227, 1232-34 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977); *United States v. Mendoza,* 464 U.S. 154 (1984) (per curiam).

Here, it is undisputed that the first two requirements are met, since the previous litigation in Tax Court and the present action involve the same parties, and the claims and the facts surrounding the two causes of action are not only coextensive but almost identical. Further, it is also undisputed that as to the third requirement, the Tax Court's judgment was a final judgment on the merits, since the Tax Court granted summary judgment in favor of the IRS and entered an Order and Decision determining the extent and amount of the Boyces' tax liabilities, which formed the crux of the litigation. Indeed, the Ninth Circuit affirmed the Tax Court's ruling by dismissing all arguments raised by the Boyces, and reviewing the Tax Court's determination under the applicable standard.[11] Therefore,

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[11] Any doubts as to the finality of the prior litigation are resolved by a description of the procedure surrounding the determination of tax liabilities by the IRS:

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the Court finds that all three requirements of the doctrine of *res judicata* are met here.

However, the Boyces make two final challenges to finding the Tax Court's decision *res judicata*. First, they contend that "the tax court is a quasi-judicial administrative agency," (*see* Pl.'s Opp'n. at 2 (*citing Delpit v. Commissioner*, 18 F.3d 768, 550 (9th Cir. 1994)), which the Court construes as an objection to the Tax Court's jurisdiction. This objection is meritless, since the Tax Court has been recognized as a court of competent jurisdiction with respect to the application of *res judicata*. *See Russell v. Commissioner*, 678 F.2d 782 (9th Cir. 1982) (holding that the Tax Court is a court of competent jurisdiction such that the doctrine of res judicata applies to that litigation

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> The IRS has established a comprehensive income tax assessment procedure that begins an audit and wends its way through the federal courts, including the Court of Appeals, the final potential step being a denial of certiorari or a judgment in favor of one party or the other by the Supreme Court of the United States. *See* IRS Publication No. 556, Examination of Returns, Appeal Rights, and Claims for Refund, at 9 (1990). Under the income tax assessment procedure, a taxpayer is barred from petitioning the Tax Court until he has first participated in a number of administrative proceedings that are initiated "against" him. These proceedings include an audit, a meeting with a revenue agent and a supervisor, a 30-day letter ("Preliminary Notice"), formal proceedings before the IRS Appeals Division, and a 90-day letter ("Notice of Deficiency"). These proceedings may continue with the taxpayer's request to the Tax Court to remove or reduce the deficiency assessment and, next, an appeal by one party or the other to the Court of Appeals.

See Delpit v. Commissioner, 18 F.3d 768, 770 (9th Cir. 1994). Here, the judgment became final and was entered after the Ninth Circuit affirmed the Tax Court.

in Tax Court); *Bodwell,* 96-2 U.S.T.C. ¶50,592 (holding that a taxpayer's previous action as to tax liabilities barred relitigation of those liabilities in a second action in district court under the principle of res judicata).

Second, the Boyces argue that there are many errors permeating the Tax Court's Decision which should prevent this Court from giving any preclusive effect to that decision. However, the Court neither agrees there were errors by the Tax Court, nor could it add a fourth element to the requirements for the application of *res judicata* by conditioning it on the accuracy of the decision to be given preclusive effect. With respect to the alleged errors, for example, the Boyces point to the Tax Court's failure to review the validity of the Notices of Jeopardy Assessments as an erroneous view of its own jurisdiction. (*See* Defs.' Supp. Brief at 2-3; Defs.' Ex. A to Supp. Brief, "Respondent's Response to Petitioners' Motion for Review of Jeopardy Assessments or Levies.") The Boyces sought review of the jeopardy assessments made by the IRS from January to June 30, 1989, and sought to enjoin the IRS from further collection of unpaid jeopardy assessments. (*See* Defs.' Sep. Statement of Disputed Fact (1/26/00) at ¶4; Defs.' Ex. E, *Boyce v. Commissioner*, No. 6979-89 (Apr. 30 1990) ("Request for Injunctive Relief; And Order To Show Cause Re: Assertion Of Jeopardy")). The IRS argued, and presumably the Tax Court agreed, that the Tax Court lacked jurisdiction to review the jeopardy assessments made before June 30, 1989 and that the Boyces' failure to post bond prevented the Tax Court from entertaining their request for injunctive relief from further collection. (*See* Pl.'s Ex. A to Supp. Brief at 1.) Despite the Boyces' arguments to the contrary, the Tax Court's interpretation of its jurisdiction is supported by the law. *See* 26 U.S.C.

§ 7429(b) (limiting Tax Court's jurisdiction to jeopardy assessments made and levies issued on or after July 1, 1989); *id.* at § 7442 (limiting Tax Court's jurisdiction to enjoin collection action by IRS during pendency of a suit in the Tax Court to situations were [sic] a bond has been filed subject to 26 U.S.C. §§ 6861 and 6863). Moreover, any review by this Court of the adjudication of the Boyces' motions in the underlying action would undermine the purpose of *res judicata,* which "does not depend on whether the prior judgment was free from error," *Mitchell v. National Broadcasting Co.,* 553 F.2d 265, 272 (2d Cir. 1977), but on the "finality of judgments in the interest of the end of litigation," *Kemp v. Birmingham News Co.,* 608 F.2d 1049, 1052 (5th Cir. 1979) (citations and internal quotations omitted).[12]

Likewise, it is irrelevant that the Boyces "suspect" or are "concerned" about the method used for calculating their tax liability, including the additions and penalties assessed, or the failure to take into account their dependant children and their status as joint filers, (*see* Defs.' Supp. Brief at 5-6). This is because even if the Boyces'

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[12] *See also Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 325 (1927) (holding that alleged error in the judgment relied upon is irrelevant for the doctrine of *res judicata*); *accord Federated Dept. Stores v. Moitie,* 452 U.S. 394 (1981); *Richey v. U.S./IRS,* 9 F.3d 1407, 1412 (9th Cir. 1993) ("[I]t is only an intervening change in the law that defeats collateral estoppel – the correctness of a prior ruling even if based upon an erroneous application of the law, is irrelevant."); *Holmes v. District of Columbia,* 801 F.2d 1371, 1373 (D.C. Cir. 1986) (holding that it was frivolous to argue that dismissal on *res judicata* grounds should be reversed because the earlier judgments were incorrect, regardless of whether the error was allegedly the result of incompetence or intentional misconduct).

suspicions are correct and the Tax Court erred, these issues could have been litigated below and must be given *res judicata* effect irrespective of any errors. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 4 – n. 6 (1982) ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that *were* [actually litigated] *or could have been raised in that action.*") (emphasis added). This is especially true here, in light of both the Tax Court's observation and the Ninth Circuit's sanction against the Boyces for failing to raise any substantive arguments going to the merits of the underlying actions. Therefore, the Court finds that the Tax Court's decision regarding the validity of the IRS's tax assessments against the Boyces meets all the requirements for the doctrine of *res judicata* to apply and that, irrespective of any errors, it precludes any relitigation of the IRS' tax assessments against the Boyces in this Court. It follows that there are no genuine issues of material fact with respect to the validity of the tax deficiencies that the government has previously assessed against the Boyces and which it seeks to reduce to judgment in its first and second claims for relief.

Accordingly, the Court **GRANTS** the government's motion for summary judgment on the *sole* issue of the *res judicata* effect of the Tax Court judgment, and finds that the Boyces cannot relitigate whether the Statutory Notices of Deficiency correctly reflect their tax deficiencies.[13]

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[13] As noted above, the Boyces remain free to challenge the amount of their present tax liabilities on the basis of those issues that *neither were nor could have been* litigated in Tax Court, including the government's accurate accounting of the tax assessments, and/or the general validity of the IRS Forms 4340.

CONCLUSION

For the foregoing reasons, the Court **DENIES** the defendants' motion to continue the government's motion for partial summary judgment in its entirety.

Additionally, the Court **GRANTS IN PART** and **DENIES IN PART** the government's motion for partial summary judgment with respect to the first and second claims for relief, as follows:

- The Court **GRANTS** the government's motion for partial summary judgment on its first and second claims of relief against the Boyces. Thus, the Court finds that the Tax Court's decision, which held that the IRS correctly calculated the tax deficiencies against the defendants in its Statutory Notices of Deficiency, is *res judicata* with respect to the tax deficiencies assessed against the Boyces.

- Moreover, in light of the government's oral and written submission of its intention to withdraw its alternative argument that the Certificates of Assessments and Payments or IRS Forms 4340 are presumptively valid, the Court **DENIES AS MOOT** the plaintiff's motion for partial summary judgment with respect to this issue.[14]

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[14] The Court notes, however, that should either party wish to move for summary judgment with respect to this issue – that is, either a motion by the government regarding the presumptive validity of the IRS Forms 4340 or the defendants' motion challenging the accuracy or authenticity of the IRS Form 4340 – the Court will hear the post-discovery motion by no later than July 10, 2000. The parties are advised that this date is not a hearing date, and that they must contact the Court in a timely manner [sic] order to get a hearing date pursuant to the Local Civil Rules for the Southern District of California.

Finally, the parties are advised to contact Magistrate Judge Louisa Porter *forthwith* in order to finalize a discovery schedule for the speedy resolution of any remaining issues in this case before the scheduled pre-trial conference on August 7, 2000 at 10:30 a.m. This includes discovery pertinent to the only issues remaining between these parties – namely, the dispute as to (1) the assessments levied and credited by the IRS and (2) the validity of the IRS Forms 4340 – as well as the government's remaining third claim for relief for fraudulent conveyances.

IT IS SO ORDERED.

Dated: 3/22/00 /s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States District
Judge

cc: Magistrate Judge Louisa Porter
all parties

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES M. BOYCE, JR., et al., Defendants.	CASE NO. 99-0003-IEG (POR) **ORDER GRANTING DEFENDANTS' MOTION FOR CLARIFICATION AND DENYING DEFENDANTS' MOTION FOR RECONSIDERATION** [Doc. Nos. 72 & 79] (Filed May 19, 2000)

Presently before the Court is defendants' motion for clarification and/or reconsideration of the Court's previous Order in which the Court denied the defendants' motion to continue and granted in part and denied in part the plaintiff's motion for partial summary judgment. For the reasons discussed below, the Court grants defendants' motion for clarification and denies their motion for reconsideration.

BACKGROUND[1]

On January 7, 1999, plaintiff the United States of America (the "government") brought the above action

[1] The facts of this case are discussed in detail in the Court's *Order Denying Defendants Motion to Continue and Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment* (3/22/00).

against multiple defendants to both reduce to judgment certain unpaid income tax assessments and to foreclose a federal tax lien against real property located at 577 Sleeping Indian Road in San Luis Rey, California (the "property"). (*See* Compl. at ¶¶ 13, 17 & 21.) The tax assessments were the result of an audit investigation pursuant to which, in early 1989, the Internal Revenue Service (the "IRS") issued Notices of Jeopardy Assessments and Statutory Notices of Deficiency to James M. Boyce, Jr. and Shelley A. Boyce (collectively "the Boyces") regarding (a) unpaid income taxes for the years 1979 to 1984 and (b) fraudulent conveyances of the property. In proceedings initiated by the Boyces, the United States Tax Court (the "Tax Court") "sustain[ed] the [IRS's] determinations contained in the notices of deficiency, including the additions to tax for fraud" for the years 1979 to 1984, (*see* Ex. I to Pl.'s Mot. for Partial Sum J., *Boyce v. Commissioner of IRS,* Docket No. 6979-89, at *17 (T.C.M. Dec. 31, 1990)), and issued its "Order and Decision" to that effect, (*see* Ex. J to Pl.'s Mot. for Partial Summ. J., *Boyce v. Commissioner of IRS,* Docket No. 6979-89, at *2-*3 (T.C.M. Jan. 4, 1991)). On appeal, the Ninth Circuit affirmed the Tax Court's decision against the Boyces. (*See* Ex. Q to Pl.'s Mot. for Summ. J., *Boyce v. Commissioner of IRS,* No. 91-70269, at *4 (9th Cir. Feb. 19, 1992))

Approximately seven years later, the government initiated this action, as noted above. On December 27, 1999, the government moved for partial summary judgment on the first and second causes of action against the Boyces based, in part, on the preclusive effect of the Tax Court's decision under the doctrine of *res judicata*. (*See generally* Pl.'s Mot. for Partial Summ.

J. (12/27/99).) Based on the parties' respective arguments in their briefs, their oral arguments at the hearing on February 7, 2000, and their responses to the Court's subsequent Order requesting supplemental briefing, (*see Order Requiring Supp. Briefing* (2/8/00) at 1-2), the Court granted in part and denied in part the plaintiff's motion for partial summary judgment on March 22, 2000. (*See Order Denying Defendants Motion to Continue and Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment* ("*Partial Summary J. Order*") (3/22/00).)

On April 3, 2000, the Boyces filed a motion for clarification and/or reconsideration pursuant to Federal Rules of Civil Procedure 59 and 60 with respect to the following four issues: (1) whether the government can raise the claim of *res judicata* now; (2) whether a judgment based on admissions is preclusive in any circumstance under *In Re Cassidy,* 892 F.2d 637 (7th Cir. 1990); (3) whether, if *res judicata* applies to the Tax Court case, the government's other claims were extinguished by the Tax Court judgment; and (4) what facts remain in dispute between the parties pursuant to Federal Rule of Civil Procedure 56(d). (*See* Def.'s Mot. (4/3/00) at 1.) On May 1, 2000, the government filed its opposition, arguing essentially that the Boyces have failed to present new arguments or sufficient justification for the Court to reconsider its prior decision. (*See* Pl.'s Opp'n. at 1-3.) On May 9, 2000, the Boyces filed their reply.

DISCUSSION

A. Applicable Law: Motion for Clarification and/or Reconsideration

The Boyces move for clarification and/or reconsideration of the Court's *Partial Summary J. Order* pursuant to Federal Rules of Civil Procedure 59 and 60. Admittedly, under these rules, a party may move "to alter or amend a judgment . . . no later than 10 days after entry of the judgment," Fed. R. Civ. P. 59(e) (West 1999), or obtain relief from "a *final* judgment, order, or proceeding [,]" Fed. R. Civ. P. 60(b) (West 1999) (emphasis added). However, the Court's *Partial Summary J. Order* does not constitute a final judgment within the meaning of Rules 59 and 60 since it adjudicated "fewer than all the claims or rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b) (West 1999). Instead, the Court's *Partial Summary J. Order* is interlocutory in nature. *See id.* ("[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties [is interlocutory].")[2]

Regardless, the Court retains the general power to revisit its non-final decisions either under its inherent authority or under federal Rule of Civil Procedure 54(b). *See Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461, 465 (9th Cir. 1989) (noting the district courts'

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[2] The Court expects that this clears the confusion apparently created by the government's opposition that the Court's *Partial Summary J. Order* is not a judgment, and answers the Boyces' query: "And if the order was not a judgment, what was it?" (Pl.'s Reply at 2.)

authority to reconsider its interlocutory orders under either its inherent powers or under Rule 54(b)); *see also* Fed. R. Civ. P. 54(b) ("[A non-final decision] . . . is subject to revision at any time before the entry of [final] judgment adjudicating all the claims and the rights and liabilities of all the parties."); Fed. R. Civ. P. 60(b), Advisory Committee's Note ("[I]nterlocutory judgments are not brought within the restrictions of . . . rule [60], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."); 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2852, at 233 (2d ed. 1995). Accordingly, the Court construes the Boyces motion for clarification and/or reconsideration as a timely request for relief pursuant to Rule 54(b).

A motion for relief from an interlocutory order under Rule 54(b) incorporates the standards of Rule 60(b) to determine whether reconsideration is justified. *See Mateo v. M/S KISO,* 805 F. Supp. 761, 786 (N.D. Cal. 1991). These standards allow the court to relieve a party from a final judgment or order "upon such terms as are just," Fed. R. Civ. P. 60(b), and dictate that absent "other, highly unusual, circumstances," reconsideration is appropriate only where (1) the district court is presented with newly discovered evidence, (2) the court committed "clear error or the initial decision was manifestly unjust," or (3) if there is an intervening change in controlling law. *See School Dist. No. 1J, Multnomah County v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted); *see also* William W. Schwarzer, et al., *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 12:160 (1994) (*citing School Dist. No. 1J*); *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997)

(noting that the same standards determine when it is appropriate to deviate from the law of the case doctrine), *cert denied*, ___ U.S. ___, 118 S. Ct. 586 (1997).

B. ANALYSIS

Before proceeding to the four issues on which the Boyces seek clarification and/or reconsideration, the Court addresses the government's argument that the Boyces have failed to comply with Civil Local Rule 7.1(i)(1) by not presenting sufficient justification for the Court to reconsider its prior decision. Local Rule 7.1(i)(1) provides, in pertinent part:

> [In a motion for reconsideration of a prior decision] . . . it shall be the continuing duty of each party and attorney seeking such relief to present to the judge to whom any subsequent application [for reconsideration] is made an affidavit of a party or witness or certified statement of an attorney setting forth the material facts and circumstances surrounding each prior application, including inter alia: (1) when and to what judge the application was made, (2) what ruling or decision or order was made thereon, and (3) what new or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior application.

Civ. Local R. 7.1(i)(1). Based on a plain reading of the rule, it is apparent that it imposes obligations that address both administrative as well legal concerns. Admittedly, as the Boyces argue, the rule "basically requires a statement from counsel identifying the judge,

the order and any new facts or circumstances not previously shown" because the Court "needs to know what ruling, of the many it makes on a daily basis, it is being asked to review, and to ensure that the motion is directed to the right judge." (Pl.'s Reply (5/9/00) at 1.) However, as the government argues, and the Boyces seem to overlook, the rule also requires that the party moving for reconsideration identify "new or different facts and circumstances" in support of its motion. *See Sure-Safe Industries, Inc. v. C & R Pier Mfg.*, 851 F. Supp. 1469, 1471 (S.D. Cal. 1993).

Here, the Boyces admit that they "do not offer new facts to the court" but argue that they "do offer new and additional legal authority, because they are concerned that the court may have misapprehended the thrust of their prior legal arguments." (Pl.'s Reply at 2.) Thus, the Court construes the Boyces' motion as claiming clear error or manifest injustice by the Court in its *Partial Summary J. Order. See Natural Resources Defense Council v. Southwest Marine, Inc.*, 39 F. Supp. 2d 1235, 1237 n. 3 (S.D. Cal. 1999) (acknowledging that no new facts or circumstances were alleged to support the motion for reconsideration in compliance with Local Rule 7.1 and construing defendant's motion for reconsideration "as one claiming clear error on the part of the Court."); *accord Parker v. United States*, No. CV 96-985 H (CM), 1996 WL 756966, at *7 (S.D. Cal. Oct. 24, 1996).[3]

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[3] *See also* William W. Schwarzer, A. Wallace Tashima, & James M. Wagstaffe, *Cal Prac. Guide: Federal Civil Procedure Before Trial* § 12:157 (1991) (noting that once an order of the court is entered, the

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Accordingly, the Court **GRANTS** the Boyces motion for clarification and proceeds to address the merits of the Boyces' motion "based on the import of the issue and to achieve finality on this question." *Natural Resources Defense Council,* 39 F. Supp. 2d at 1237 n. 3.

1. The Propriety Of A Plaintiff's Assertion Of Res Judicata Against A Defendant

The Boyces argue that the government, as the plaintiff and complaining party, cannot use *res judicata* to bar the Boyces from raising defenses in this action because (i) *res judicata* is recognized as an affirmative defense that must be pleaded under the Federal Rule of Civil Procedure 8(c) and (ii) no authority supports the use of *res judicata* to preclude a defense. (*See* Pl.'s Mot. at 3-4; Pl.'s Reply at 2-3.) The Court cannot agree. First, the sole purpose of Federal Rule of Civil Procedure 8(c) is to give an opposing party notice of the defenses and a chance to argue why their imposition would be inappropriate. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1970). Therefore, Rule 8(c) does not make the doctrine of *res judicata* an "affirmative defense" available only to defendants, but simply states that when used as an affirmative defense by a defendant, it must be pleaded with specificity to notify the opposing party. Indeed, even the Boyces acknowledge that *res judicata* may be asserted by either party since they argue that "[h]ad the

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judge can set aside or change it *either* through a Rule 60 motion *or* a motion for reconsideration pursuant to Local Rule 7.1(i)).

government pleaded the Tax Court decision in its original complaint it may have been able to file its Motion for partial Summary Judgment here based on the Tax Court decision." (Pl.'s Mot. at 4.) In other words, despite their assertions to the contrary, it is lack of notice that troubles the Boyces, and not the government's invocation of *res judicata* to prevent relitigation of claims decided by the Tax Court. Since the Court has already discussed the issue of notice and timeliness with respect to the government's assertion of *res judicata* in detail, (*see Partial Summary J. Order* at 10-12), the Court finds it unnecessary to address it here.[4]

Second, even if there is no case wherein *res judicata* was used by a plaintiff except in defense to a counterclaim, as the Boyces argue, the unique procedural posture of this litigation alone does not prohibit its invocation here. Indeed, there is ample authority for the proposition that the doctrine of *res judicata* is available to either party as long as its underlying purpose of preventing the relitigation of the same claims is served. *See Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)

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[4] The Court does note that the government informed the Boyces about its intention to invoke res judicata months before doing so, as noted in the court's *Partial Summary J. Order*. The Court is sympathetic to the Boyces' protest that as unrepresented parties at the time, they could not have been expected to understand the intricacies of a complex legal doctrine, such as *res judicata*. However, it certainly does not follow that the government should be penalized for its efforts in discharging its obligations regarding notice simply because of the Boyces' previous *pro per* status. Moreover, since the Boyces have been adequately represented during the Court's application of the doctrine to their case, their failure to understand the complexities of the doctrine is not prejudicial.

(describing *res judicata* as embodying "a finality as to the claim or demand in controversy, concluding *parties* and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.") (emphasis added); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1933) ("The [original] judgment puts an end to the cause of action, which cannot again be brought into litigation *between the parties* upon any ground whatever, absent fraud or some other factor invalidating the judgment.") (emphasis added); *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1232-33 (2d Cir.) ("Briefly stated, the *parties* to an action in which a judgment on the merits has been rendered, or their privies, are barred from relitigating the same cause of action in a second proceeding [pursuant to res judicata].") (emphasis added), *cert. denied*, 434 U.S. 903 (1977); *accord United States v. Mendoza*, 464 U.S. 154 (1984) (per curiam). As is apparent from the language of these decisions, in no instance do courts focus on whether the party invoking res judicata in a subsequent action between the same parties was the plaintiff or the defendant in the original action.[5]

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[5] The Court also reminds the Boyces that it is only where agents of or privies to the original litigants seek estoppel that the identify of the party asserting the doctrine becomes crucial. *See Expert Electric Inc.*, 554 F.2d at 1233 ("The threshold requirement of identify of parties, qualified by the doctrine of privity, finds its roots in the ancient notion, now supplemented by the due process clause, that a person cannot be bound by a judgment without notice of a claim and an opportunity to be heard."); *Astron Industrial Associates, Inc. v. Chrysler Motor Corp.*, 405 F.2d 958, 961 (5th Cir. 1968); (noting that whether identity of parties is

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This is especially true given the policy animating the doctrine, that is, to ensure the finality of decisions, conserve judicial resources, and protect litigants from multiple lawsuits. *See McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir. 1986) (holding that even a trial court may, at any time, properly raise the question of *res judicata* on its own motion to satisfy the policy behind the doctrine); *Magnus Electronics, Inc. v. La Republica Argentina*, 830 F.2d 1396, 1403 (7th Cir. 1987) ("Res judicata protects a victorious party from being *dragged into court time and time again* by the same opponent on the same cause of action.") (citation omitted) (emphasis added). The Boyces characterize the government as "the 'victorious party' . . . doing the 'dragging'," (Pl.'s Mot. at 4) and argue that the government is only at risk for "vexatious litigation and inconsistent judgment[]" under *Magnus* because of its own pleading, (*see id.*) In the literal sense, the Boyces are accurate insofar as the government initiated this lawsuit. However, it is not the government's pleading but claims by the Boyces' such as the assertion that they

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evident for the application of the principles of estoppel is a factual determination of substance, not mere form); *accord Aerojet General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) (noting that "identity of parties" for the application of res judicata request that a party whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation). Even then, however, the inquiry is not strictly whether the party invoking estoppel is a plaintiff or defendant, but whether its interests were adequately represented by another in the prior litigation. In some instances, the latter inquiry regarding the alignment of interests may or may not implicate the status of the original parties as plaintiffs or defendants.

"have never been expressly made liable for the alleged federal taxes asserted in the United States of America's complaint," (*see* Boyces' Answer (1/26/99) at ¶¶ 49-50), which threaten the government's ability to avail repose from vexatious litigation on claims that were or could have been raised before the Tax Court.

The Boyces provide not one reason why a plaintiff's assertion of *res judicata* based on a prior judgment on the merits between the same parties in a court of competent jurisdiction runs contrary to either the letter or the spirit of the doctrine. Clearly, if the purpose behind the doctrine of *res judicata* is to give finality to a prior decision on the merits of the claims in dispute, it is axiomatic that either parties' assertion of *res judicata* in a subsequent action fulfills that purpose. In contravention of this principle, the Boyces would have this Court find that if a defendant were to win a judgment on the merits against a party in a prior action, it would be prohibited from rectifying a party's non-compliance with the judgment by initiating a subsequent lawsuit enforcing the prior judgment and asserting *res judicata*. Here, it is undisputed the government was the prevailing party in the underlying Tax Court decision, and that as such, it is entitled to enforce the Tax Court's final judgment in its favor and collect the tax assessments approved by the Tax Court in this action without relitigating the same claim here.

Accordingly, the Court **DENIES** the Boyces' motion for reconsideration with respect to this issue and finds that the government, as the plaintiff, may properly assert *res judicata*.

2. The *Res Judicata* Effect Of A Judgment Based On Admissions Under Tax Court Rule 90(c)

The Boyces vociferously protest this Court's finding that a judgment based on admissions under Tax Court Rule 90(c) may be given preclusive effect under *res judicata* notwithstanding Tax Court Rule 90(f) and consistent with the Seventh Circuit's decision in *In re Cassidy*, 892 F.2d 637 (7th Cir.), *cert denied*, 498 U.S. 812 (1990). However, none of the Boyces' arguments in support of reconsideration are persuasive. As a preliminary matter, the Boyces argue that "[d]espite several hours of pondering," they cannot determine what the Court meant by the following statement in its *Partial Summary J. Order*:

> Therefore, contrary to the defendants' assertion, the Seventh Circuit's explanation that 'a judgment based solely on admissions under Tax Court Rule 90 (or Fed. R. Civ. P. 36) cannot be used to estop relitigation of a factual question in a later proceeding;" (*see* [*In re Cassidy*, 892 F.2d at 640] n.1) stands only for the proposition that parties in one action are estopped in another action from relitigating issues that were actually litigated previously, and not *just* those issue[s] which could have been litigated.

Partial Summary J. Order at 14 (emphasis added) (citations omitted). The Court acknowledges that it inadvertently included the word "just" in the last sentence of the statement. With the sole alteration of eliminating the word "just," and correcting the singular

use of the word "issue" the following statement captures what the Court intended to state:[6]

> Therefore, contrary to the defendants' assertion, the Seventh Circuit's explanation that 'a judgment based solely on admissions under Tax Court Rule 90 (or Fed. R. Civ. P. 36) cannot be used to estop relitigation of a factual question in a later proceeding;" (*see* [*In re Cassidy*, 892 F.2d at 640] n.1) stands only for the proposition that parties in one action are estopped in another action from relitigating issues that were actually litigated previously, and not those issues which could have been litigated.

In other words, because collateral estoppel requires that issues to be given preclusive effect be actually litigated, and Rule 90(c) allows the lack of a response to be construed as an admission, a factual issue decided in reliance upon Rule 90(c) cannot satisfy the requirements of collateral estoppel. To the contrary, whether or not the Tax Court's decision was based on construing the Boyces's non-responsiveness as admissions under Rule 90(c), that decision can be given preclusive effect because *res judicata* does not require that claims be actually litigated to bar subsequent claims between the same parties, period.

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[6] Given the application of Rule 60 standards to a motion for relief from an interlocutory order under Rule 54(b), the Court notes that it has the authority to make this clerical alteration. *See In re Jee*, 799 F.2d 532, 535 (9th Cir. 1986) (holding that the court may act pursuant to Rule 60(a) "'to make an order reflect the actual intentions of the court, plus necessary implications.'") (citing *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072, 1074 (9th Cir. 1981).

Next, in light of the Boyces' confusion, the Court reiterates that the Seventh Circuit stated in *In re Cassidy* that "a judgment based solely on admissions under Tax Court Rule 90 . . . cannot be used to estop relitigation of a *factual question* in a later proceeding," *see id.*, 892 F.2d at 640, n.1 (emphasis added),[7] and prefaced this explanation with the following: "It follows that the judgment of the Tax Court *on that factual issue*, which is based solely on the admissions, cannot be a bar in this later proceeding." *Id.* at 640 (emphasis added). Here, the Court does not estop the Boyces from relitigating factual questions based on solely on admissions under Rule 90(f) but gives preclusive effect to the Tax

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[7] Moreover, the Court notes that in the present case, neither was the Tax Court's decision based solely on admissions under Tax Court Rule 90, nor is there a factual question for relitigation in this proceeding. Indeed, simultaneous to construing the Boyces' failure to respond to the government's interrogatories as admissions under Tax Court Rule 90(c), the Tax Court granted the government's motion for summary judgment, based on the following: the parties' pleading and memoranda; the Boyces' failure to object to the motion for summary judgment despite the Tax Court's invitation for a response; the government's extrinsic evidence such as the Boyces past federal tax returns, the quitclaim deed, and deeds of trust regarding the property at issue; the government's demonstration of fraud by clear and convincing evidence; and applicable precedent authorizing the use of the "bank deposits method" to calculate the income where taxpayers fail to submit records. (*See* Ex. I to Pl.'s Mot. for Partial Summ. J., *Boyce v. Commissioner of IRS*, Docket No. 6979-89, at *10-*17.) Also, the Tax Court specifically found that the government had properly moved for summary judgment, based in part on its discovery requests that were deemed admissions against the Boyces under Rule 90, yet the Boyces failed to satisfy their burden of setting forth specific facts showing the existence of a genuine issue of material fact for trial. (*See id.*) Giving preclusive effect to this judgment is not the same as barring relitigation of factual questions, as in *In re Cassidy*, 892 F.2d at 640.

Court's judgment, based *in part* on Rule 90(f), that the government calculated the Boyces' tax assessments by the correct method and in reliance upon proper evidence. Notwithstanding the Boyces' vehemence, the Seventh Circuit did not "effectively hold[]," as the Boyces argue, "that judgments made on the basis of unanswered admissions is not 'on the merits.'" (Pl.'s Mot. at 7.) Indeed, the Seventh Circuit would not misconstrue the law thus, given the well-established difference between the "actually litigated" requirement of collateral estoppel and the application of *res judicata* to judgments analogous to those based on admissions, such as default judgments and stipulated settlements. *See Israel v. Carpenter*, 120 F.3d 361, 365 (2d Cir. 1997) ("Ordinarily, a stipulation of dismissal 'with prejudice' as to a pending action is unambiguous; like any such dismissal, it is 'deemed a final adjudication on the merits for *res judicata* purposes on the claims asserted or which could have been asserted in the suit.'"); *see SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) ("A consent decree is a judgment, has the force of *res judicata*, and it may be enforced. . . . "); *see also Partial Summary J. Order* at 15 (citations omitted). This is precisely why the Seventh Circuit noted that default judgments, stipulated settlements, and consent judgments, cannot be given *collateral estoppel* effect, and did not note that they can be given *res judicata* effect. *See In re Cassidy*, 892 F.2d at 640, n.1[8]

[8] In footnote 1, the Seventh Circuit noted:

One could analogize deemed admissions to a default judgment on an issue of fact, but default judgments do not have

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None of the Boyces' remaining arguments, in reliance upon well-established precedent considered by the Court, support their claim of clear error by the Court. In fact, it is ironic that the Boyces quote extensively from *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, n.1 (1984), to advise the Court of the distinction between "collateral estoppel" and "res judicata," when the Court itself directed the Boyces to that case, recognizing the confusion engendered by the subtle and complex relationship between these doctrines. *See*

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collateral estoppel effect. *Matter of Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983); 1B Moore's Federal Practice ¶ 0.444[2]; *but see Matter of Wilson*, 72 B.R. 956 (Bkr. M. D. Fla. 1987) (Default judgment in creditor's securities fraud suit collaterally estopped debtor from denying fraud in action to exempt debt from bankruptcy discharge). One could consider a Rule 90 admission a special type of stipulation, but judgments based on stipulated facts have no collateral estoppel effect as to the matters stipulated, especially stipulations in tax cases. *United States v. International Building Co.*, 345 U.S. 502, 506 (1953), Moore's Federal Practice ¶ 0.444[4]. One might also analogize to a consent judgment on the factual issue. In *Klingman v. Levinson*, 831 F.2d 1292 (7th Cir. 1987), a consent judgment in a state court suit admitting fraud estopped the debtor from contesting the factual underpinnings of a later bankruptcy action to exempt the debt from discharge. The consent decree from the state case specifically recited that "in any subsequent proceeding all of the allegations of the Complaint and findings of this Court may be taken as true and correct without further proof." This court held that the "actually litigated" requirement for collateral estoppel would not bar use of the consent decree. . . .

Id. at 640 n.1 Clearly, the Seventh Circuit was cognizant that the analogous stipulated and consent judgments may have preclusive effect under the doctrine of res judicata. Thus, the Boyces interpretation of *In re Cassidy* is unpersuasive.

Partial Summary J. Order at 15, n.10.[9] The Boyces even fail to make new arguments not previously considered by the Court, insofar as the Boyces quote from the Seventh Circuit's decision in *In re Cassidy* and Tax Court Rule 90(f), and advocate their interpretation of the language of both. (*See* Pl.'s Mot. at 5-8.) Since the Court's *Partial Summary J. Order* took into consideration the entire record and memoranda filed by the parties, as well as their oral arguments and supplemental briefing, the Court finds it unnecessary to separately address these arguments presently. *See Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985) (holding that a motion for reconsideration is properly denied if it presents no arguments that had not been raised in opposition to summary judgment). Finally, the Court notes that, insofar as the Seventh Circuit's decision is only persuasive authority, this Court's interpretation of the preclusive effect of judgments based on admissions under Tax Court Rule 90(c) is independently supported by the reasoning in its *Partial Summary J. Order*.[10]

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[9] Likewise, the Boyces' reliance on *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1232-34 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977), (*see* Pl.'s Mot. at 7), is not new. *See Partial Summary J. Order* at 16 (citing *Expert Electric, Inc.*, 554 F.2d at 1232-34).

[10] In other words, Tax Court Rule 90(f) prohibits the use of "[a]ny admission made by a party" in any other proceeding, and not a judgment based partly on such admissions. To that extent, Rule 90(f) is not inconsistent with the doctrine of *res judicata*, but limits the application of the related doctrine of collateral estoppel, as discussed in the Court's *Partial Summary J. Order* at 15 ("[T]he Court finds that a judgment based on admissions is not a *per se* bar to the doctrine of res judicata as long as all other elements of res judicata are met."); *see also*, supra, n. 7. Thus, Tax Court Rule 90(f) provides more protection that the doctrine of *res judicata*, which estops parties in a

(Continued on following page)

Accordingly, the Court **DENIES** the Boyces' motion for reconsideration with respect to this issue for failure to show clear error or manifest injustice by the Court.

3. The Application Of Res Judicata Against The Government Based On The Tax Court's Decision

The Boyces argue that if *res judicata* applies to the Tax Court decision, then the government should likewise be precluded "from relitigating its claims relating to the property, i.e. that the subject conveyances were fraudulent, that its liens thereon are valid, or that the BOYCES had any dominion or control over the same." (Pl.'s Mot. at 9.) As a preliminary matter, this issue is not an appropriate subject for a motion for reconsideration since the government did not raise it in its motion for summary judgment and the Court did not decide or consider it in its *Partial Summary J. Order*. Moreover, even if the issue were properly before the Court, the Boyces overlook the fact that under the doctrine of *res judicata*, a prior judgment only constitutes a bar to a subsequent action between the same parties when the

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subsequent action from litigating claims that *could have been* litigated in the previous suit between the same parties, regardless of whether such a failure to respond is construed as an admission as well. because the Boyces are estopped by the doctrine of *res judicata* because they failed to respond to the merits of the government's motion for summary judgment in Tax Court, it is immaterial that the Tax Court, in addition to noting the lack of any meritorious arguments by the Boyces, used Rule 90(f) to construe their failure to respond to certain discovery requests as admissions against them. Hence the Court's previous ruling that a judgment based on admissions does not bar the doctrine of *res judicata*.

claims or causes of action are the same or substantially coextensive, *see United States v. Mendoza*, 464 U.S. 154 (1984), which is not the case here.

The Boyces' petition to the Tax Court requested only a redetermination of the income tax deficiencies against them, and the Tax Court had no other issue before it save the tax assessments against the Boyces. (*See* Pl.'s Ex. I to Mot. for Summ. J., *Boyce v. Commissioner of IRS*, No. 6979 at *2 ("The issue . . . is whether petitioners, as a matter of law, should be found liable for the tax deficiencies and additions to tax as determined by respondent [the Commissioner of the Internal Revenue Service] in the deficiency notices.").) Pursuant to its well-established and comprehensive tax assessment procedure, the administrative proceeding before the Tax Court focused only on the deficiency assessments, and the government did not and could not raise its claim for the foreclosure of liens against the property. *See Delpit v. Commissioner*, 18 F.3d 768 9th Cir. 1994) (describing the IRS's administrative procedure in detail). Therefore, the requirements of *res judicata* are not met with respect to the government's causes of action relating to the property: "[If] the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time." *Sunnen,* 333 U.S. at 597. Thus, to the extent that the Tax Court addressed the factual question of the fraudulent conveyances of the property, it only did so to determine whether the government's addition of civil fraud penalties to the Boyces' tax assessments was proper, not to determine the validity of any lien or

foreclosure of that lien encumbering the property at issue. Although such a situation, "where the second action between the same parties is upon a different cause or demand," would ordinarily allow the government to seek that the Boyces' be prevented from relitigating the issue of their fraudulent conveyance of the property pursuant to collateral estoppel, *Sunnen*, 333 U.S. at 597-98 (quoting *Cromwell*, 94 U.S. at 353), Tax Court Rule 90 and the decision in *In re Cassidy* prevents such a request, as the government concedes. (*See* Govt.'s Opp'n. at 5 ("[T]he United States will not argue that the factual finding by the Tax Court with respect to the property transfers operate as collateral estoppel in this case.").)

Accordingly, finding the Boyces' request for "reconsideration" with respect to this issue both improper and unmeritorious, the Court **DENIES** their motion on this issue.

4. Facts That Remain In Dispute Between The Parties

The Boyces argue that pursuant to Federal Rule of Civil Procedure 56(d), the Court should clarify what issues remain in dispute between the parties, and therefore, subject to ongoing discovery. Specifically, the Boyces note that "both counsel disagree whether the defaults of two parties and a stipulation by a third party are sufficient to determine the rights of the remaining parties to the property." (Defs.' Mot. at 10.) This brief description is insufficient for the Court to properly understand and appreciate, let alone adequately address, the entirety of the Boyces' request for clarification pursuant to Rule 56(d). Moreover, insofar as the Boyces

state that this dispute arises "regarding the scope of discovery," (*see id.*), the Court finds that the issue should properly be addressed by Magistrate Judge Louisa Porter. Indeed, the Boyces indicate that a telephonic hearing before Judge Porter was scheduled on the issue the day after they filed their motion for reconsideration and/or clarification, (*see id.*), at which Judge Porter presumably advised the parties regarding discovery. This is especially true since the Boyces do not raise this issue in their reply, despite the fact that the government's opposition, filed after the date of the scheduled telephonic hearing before Judge Porter, states that "[w]ith the assistance of Magistrate Judge Porter, the government is moving forward with discovery [.]" (Govt.'s Opp'n. at 5 n. 4.)

Accordingly, the court **DENIES** the Boyces' motion for reconsideration as to what facts remain subject to discovery.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Boyces' motion for clarification and **DENIES** their motion for reconsideration in its entirety. Additionally, the Court amends the clerical error noted in its *Partial Summary J. Order* with respect to the inadvertent inclusion of the word "just" on page 14, line 21, and the mistaken use of the singular form of the word "issue" in the same line, and **ORDERS** the Clerk of the Court to **FILE** the amended Order attached herein so as to correct the record.

IT IS SO ORDERED.

Dated: May 18, 2000

/s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States
District Judge

cc: Magistrate Judge Louisa Porter
all parties

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JAMES M. BOYCE, Jr., a.k.a. JAMES M. BOYCE et al., Defendants	Civil No. 99cv0003-L(POR) **ORDER: (1) GRANTING THE GOVERNMENT'S RENEWED MOTION FOR SUMMARY JUDGMENT AND ENTRY OF JUDGMENT ON THIRD CAUSE OF ACTION; (2) DENYING THE BOYCES' MOTIONS FOR SUMMARY JUDGMENT AND QUIET TITLE, TO AMEND THE ANSWER, TO STRIKE EXHIBITS AND REOPEN DISCOVERY; AND (3) GRANTING THE BOYCES' *EX PARTE* APPLICATION** [Docket Nos. 89, 94, 110, 112, 113, 126, 127, 145] (Filed Feb. 15, 2001)

This matter came on regularly for a hearing on the: (1) Government's renewed motion for partial summary judgment; (2) Government's motion for default judgment and judgment by stipulation on its third cause of action for foreclosure of federal tax liens; (3) Defendants' James M. Boyce, Jr. a.k.a. James M. Boyce ("James Boyce") and Shelley A. Boyce ("Shelley Boyce") (collectively referred to as "the Boyces") motion for summary judgment and quiet title; and (4) the Boyces' motion to amend the answer. Henry C. Darmstadter, of the U.S. Department of Justice Tax Division appeared for Plaintiff United States, and

Richard Shepard of the Shepard Law Offices appeared for Defendants.

FACTUAL BACKGROUND

I. Facts Relevant to the Tax Assessments.

For the years 1979 and 1981, James Boyce and Shelley Boyce filed Forms 1040 that purported to be joint federal income tax returns as husband and wife, but did not disclose any financial information (Darmstadter (12/23/99) Decl. Exhs. A, B, C.)[1] Instead, the Boyces wrote "none" "object" in all the appropriate lines. *Id.* Also, for the years 1982 to 1984, the Boyces failed to file any federal tax returns. (Darmstadter (12/23/99) Dec. Exhs. M, N, P.)

The Internal Revenue Service ("IRS") issued Notices of Jeopardy Assessments and Rights of Appeal to the Boyces on January 19, 1989 regarding jeopardy assessments made against them for income taxes for the years 1979 to 1984. (Darmstadter (12/23/99) Decl. Exhs. F, G.) The IRS also issued Statutory Notices of Deficiency on March 17, 1989, regarding income tax deficiencies for the years 1979 to 1984. (Darmstadter (12/23/99) Decl. Exhs. D, E.) In the Statutory Notices of Deficiency, the IRS determined separate deficiencies and additions in the following amounts:

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[1] In support of its first motion for partial summary judgment filed on December 23, 1999, the Government submitted Exhibits "A" through "Q" attached to the Declaration of Henry C. Darmstadter. The Government has incorporated by reference those exhibits, and has also submitted additional exhibits attached to the June 16, 2000 Declaration of Henry C. Darmstadter in support of this renewed motion for partial summary judgment that commence with exhibit letter "R."

James M. Boyce

Year	Deficiency	Section 6653(b)	Section 6661(a)	Section 6654(a)
1979	$3,947	$1,974	-0-	-0-
1980	$4,887	$2,444	-0-	$311
1981	$12,705	$6,353	-0-	$973

Year	Deficiency	Section 6653(b)(1)	Section 6653(b)(2)	Section 6661(a)	Section 6654(a)
1982	$15,471	$7,736	*	$3,868	$1,506
1983	$14,854	$7,427	**	$3,714	$908
1984	$14,491	$7,246	***	$3,623	$912

* 50% of the interest due on $15,471

** 50% of the interest due on $14,854

*** 50% of the interest due on $14,491

(Darmstadter (12/23/99) Decl. Exhs. D, I at 3.)

Shelley A. Boyce

Year	Deficiency	Section 6653(b)	Section 6661(a)	Section 6654(a)
1979	$2,052	$1,046	-0-	-0-
1980	$2,785	$1,395	-0-	$178
1981	$9,943	$4,972	-0-	$762

Year	Deficiency	Section 6653(b)(1)	Section 6653(b)(2)	Section 6661(a)	Section 6654(a)
1982	$12,442	$6,221	*	$3,111	$1,211
1983	$11,516	$5,728	**	$2,879	$705
1984	$10,220	$5,110	***	$2,555	$643

* 50% of the interest due on $12,442

** 50% of the interest due on $11,516

*** 50% of the interest due on $10,220

(Darmstadter (12/23/99) Decl. Exhs. E, I at 3-4.)

On April 10, 1989, the Boyces jointly petitioned the United States Tax Court (the "Tax Court") for a redetermination of the IRS's income tax deficiencies against them for the years 1979 to 1984 based on various constitutional and jurisdictional challenges. (Darmstadter (12/23/99) Decl. Exh. H.) When the IRS filed a motion for summary judgment, the Boyces failed to file any objections to the pending motion on the merits. (*See* Darmstadter (12/23/99) Decl. Exh. I at 3.) After reviewing the evidence presented, the Tax Court issued a Memorandum Opinion (T.C. Memo 1990-658) "sustaining [the IRS's] determinations contained in the notices of deficiency, including the additions to tax for fraud" and held that the IRS was entitled to summary adjudication on the merits of the case as a matter of law. (Darmstadter (12/23/99) Decl. Exh. I at 17.) On January 4, 1991, the Tax Court issued an "Order and Decision" ordering that the Boyces' deficiencies in, and additions to, their federal income tax are as follows:

James M. Boyce

Year	Deficiency	Section 6653(b)	Section 6661(a)	Section 6654(a)
1979	$3,947	$1,974	-0-	-0-
1980	$4,887	$2,444	-0-	$311
1981	$12,705	$6,353	-0-	$973

Year	Deficiency	Section 6653(b)(1)	Section 6653(b)(2)	Section 6661(a)	Section 6654(a)
1982	$15,471	$7,736	*	$3,868	$1,506
1983	$14,854	$7,427	**	$3,714	$908
1984	$14,491	$7,246	***	$3,623	$912

* 50% of the interest due on $15,471

** 50% of the interest due on $14,854

*** 50% of the interest due on $14,491

(*See* Darmstadter (12/23/99) Decl. Exh. J at 2.)

Shelley A. Boyce

Year	Deficiency	Section 6653(b)	Section 6661(a)	Section 6654(a)
1979	$2,092	$1,046	-0-	-0-
1980	$2,789	$1,395	-0-	$178
1981	$9,943	$4,972	-0-	$762

Year	Deficiency	Section 6653(b)(1)	Section 6653(b)(2)	Section 6661(a)	Section 6654(a)
1982	$12,442	$6,221	*	$3,111	$1,211
1983	$11,516	$5,728	**	$2,879	$705
1984	$10,220	$5,110	***	$2,555	$643

* 50% of the interest due on $12,442

** 50% of the interest due on $11,516

*** 50% of the interest due on $10,220

Id. at 3. The Tax Court also assessed a $5,000 penalty against each of the Boyces under 26 U.S.C. § 6673 for

instituting the Tax Court proceeding for frivolous or groundless reasons or to cause delay. *Id.*

The Boyces appealed the Tax Court's decision to the United States Court of Appeals for the Ninth Circuit (Darmstadter (12/23/99) Decl. Exh. Q.) The Ninth Circuit issued an unpublished Memorandum Decision on February 19, 1992, affirming the Tax Court's decision. *Id.* The Ninth Circuit stated that in their appeal the Boyces did "not challenge the merits of the deficiencies, additions, or penalties" but rather contended that: (1) the Tax Court failed to follow the Administrative Procedures Act; (2) the district counsel was required to sign the notice of deficiency; (3) the notices of deficiency were invalid because no returns were filed; (4) they were denied discovery; (5) and they were denied due process. *Id.* at 2. The Court rejected each of the Boyces arguments, and imposed a $1,500 sanction against the Boyces for bringing a frivolous appeal. *Id.* at 2-4.

Over seven years later and several months after this action was filed, on October 20, 1999, the IRS recalculated deficiencies against the Boyces for the years 1979 to 1984 in Official Certificates of Assessments and Payments (hereinafter referred to interchangeably as "Forms 4340" and "Certificates"). (Darmstadter (12/23/99) Decl. Exhs. K-P). The IRS Forms 4340 incorporate the additions for fraud and penalties per the Tax Court's Order and Decision, and credit partial abatements to Shelley Boyce's jeopardy assessments for the years 1980 and 1984. (*See* Maloney Decl. ¶¶ 5-19).

II. Facts Relevant to the Foreclosure of Federal Tax Liens on the Subject Property.

In 1972, the Boyces purchased real property located at 577 Sleeping Indian Road in San Luis Rey, California ("the Property"). (James Boyce Depo. at 33:23-34:18; Boyces' Depo. Exh.[2] A.) James Boyce's parents were added to the title to aid with securing financing on the purchase. (James Boyce Depo. at 40:5-14.) James Boyce's parents transferred their interest in the Property to James and Shelley Boyce by quitclaim deed in December 1975. (James Boyce Depo. at 43:12-44:1; Boyces' Depo. Exh. B.) From 1975 to the present, the Boyces have continuously resided on the Property. (James Boyce Depo. at 7:7-22; Shelley Boyce Depo. at 6:9-15.)

In March 1985, the Boyces created Defendant Jacob Family Preservation Trust, a.k.a., the Jacob Family Trust ("the Trust") for estate planning and asset management purposes. (James Boyce Depo. at 50:5-51:4; Boyces' Depo. Exh. F.) Under the terms of the Trust, James Boyce acted as the trustor, and Shelley Boyce and Defendant Rob Tanner, a friend and neighbor, acted as trustees. (Boyces' Depo. Exh. F.) The Boyces and their two children were designated as the original beneficiaries. *Id.* To effect transfer of the Property to the Trust, on January 23, 1985, and then on March 8, 1985, Shelley Boyce deeded her interest in the Property by quitclaim deed to James Boyce. (James Boyce Depo. at 47:14-17; Boyces' Depo. Exhs. C, D.) Then by grant deed dated March 29, 1985, James

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[2] Exhibits to both James Boyce's and Shelley Boyce's depositions were compiled together; accordingly, the Court refers to these Exhibits as "Boyces' Depo. Exh. ___").

Boyce transferred the Property to the Trust. (Boyces' Depo. Exh. E.) Subsequently, on September 4, 1985, the Trust, through its trustees, transferred the Property to Defendant White Rail Company ("White Rail") by grant deed. (Boyces' Depo. Exh. G.) White Rail was created by Nassau Life Insurance Company, Ltd., at James Boyce's request and is classified as a "common law contractual business trust organization" and domiciled in Grand Turk, Turks and Caicos Islands, British West Indies. (James Boyce Depo. at 74:3-76:9; Boyces' Depo. Exh. H.) At the time White Rail was created, James Boyce was its president, and Shelley Boyce its secretary. (Boyces' Depo. Exh. H at 19.) The Boyces later became trustees of White Rail. *Id.* at 26, 27. In consideration for their interest in White Rail, the Boyces agreed to transfer almost all their personal and real property into White Rail. (James Boyces Depo. at 88:24-89:11; Boyces' Depo. Exh. H at 20, 21, 43-46.)

In August 1985, Nassau Life resigned as trustee of White Rail, and in September, 1985, the Boyces resigned as trustees of White Rail and were replaced by Rob Tanner and Mary Rombotis, James Boyce's sister. (Boyces' Depo. Exh. H at 27-36.) In October 1985, the Boyces were appointed managing directors for White Rail. (Boyces' Depo. Exh. H at 37-39.) In December 1988, Rob Tanner and Mary Rombotis resigned as trustees for White Rail and were replaced by Roman Pina of Lancaster Enterprises and Robin Welsh of New Mexico Frontier. (Boyces' Depo. Exh. H at 51-53.) In February 1998, both Roma [sic] Pina of Lancaster Enterprises and Robin Welsh of New Mexico Frontier resigned as trustees of White Rail. (Boyces' Depo. Exh. H at 67-68.) The Government currently does not know who is the current trustee(s) of White Rail.

In March 1986, the Boyces opened a corporate checking account under the name "White Rail Company" at the Vista Branch of Southwest Bank. (Boyces' Depo. Exh. M.) The Boyces are authorized signatories on the account and have used the account to pay expenses associated with the Property. (Boyces' Depo. Exhs. M, N.) In March 1986 Shelley Boyce also opened a private mail box account for White Rail with A-1 Service Stop in Vista, California. (Boyces' Depo. Exh. O.) Also that month, White Rail granted the San Diego Gas & Electric company an easement on the Property that was signed by both James and Shelley Boyce. (Boyces' Depo. Exh. P.) The Boyces do not pay rent to White Rail, but have paid all expenses associated with the Property, including maintenance, utilities, insurance, and property tax. (James Boyce Depo. 92:15-94:5.)

On October 23, 1987, the Boyces created another trust organization, Defendant Northern Plains Service. (James Boyce Depo. at 107:4-108:2; Boyces' Depo. Exh. J.) The original trustees for Northern Plains Service were Rob Tanner and Mary Rombotis, while the Boyces acted as its Managing Directors. (Boyces' Depo. Exh. J at 10, 14.) Also, the Boyces as Exchangers obtained the beneficial interest in Northern Plains Service in consideration for $10 and a second deed of trust on the Property. (Boyces' Depo. Exh. J at 9-10, 34-35.)

On October 23, 1987 – the same day Northern Plains Service was created – Northern Plains Service' trustees authorized a loan to White Rail in the amount of $350,000, payable in ten annual installments. (Boyces' Depo. Exh. J at 29.) On the same day, White Rail's trustees executed a note secured by deed of trust in the amount of $350,000, payable in twenty annual installments in the amount of

$43,352.00. (Boyces' Depo. Exh. J at 36.) On December 15, 1987, the trustee for White Rail executed a deed of trust for the benefit of Northern Plains Service to secure the note. (Boyces' Depo. Exh. I.) The Government contends there is no evidence of Northern Plains Service ever providing any monies to White Rail, nor is there any evidence of White Rail making any payments to Northern Plains Service in accordance with the note. The Government also contends there is no evidence that Northern Plains Service has ever had sufficient assets to make a $350,000 loan. At their depositions, the Boyces testified they did not recollect whether any monies were actually loaned from Northern Plains Service to White Rail, or whether any payments were made by White Rail on any loans. (James Boyce Depo. at 116:13-21; Shelley Boyce Depo. at 58:9-59:2.)

PROCEDURAL BACKGROUND

On January 7, 1999, the Government brought this action against the Boyces, and individuals and entities associated with the Property. The Government alleges the Trust, White Rail White Rail [sic], and Northern Plains Service are the alter egos, nominees, or agents of the Boyces and may claim an interest in the Property. (Complaint ¶¶ 7, 8, 9.) Defendant Rob Tanner is sued as trustee of the Trust and White Rail. (Complaint ¶ 10.) The Government has sued Defendant Land Title Insurance Company and the State of California Franchise Tax Board because they may claim an interest in the Property. (Complaint ¶¶ 11, 12.) The first cause of action is to reduce the IRS's tax assessments against James Boyce to judgment in the amount of $290,761.96 (excluding accrued interest). (Complaint ¶¶ 14-17.) The second cause of action

is to reduce the IRS's tax assessments against Shelley Boyce to judgment in the amount of $227,249.98 (excluding accrued interest). (Complaint ¶¶ 18-21.) The third claim alleges the conveyances and transfers of the Property were fraudulent and made without fair consideration, and that the Trust, White Rail, and Northern Plains Service are shams controlled by the Boyces, or alternatively, are the Boyces' nominees, alter egos, or agents. (Complaint ¶¶ 22-46.) That cause of action seeks to set aside the conveyances and foreclose on federal tax liens on the Property. *Id.*

White Rail responded to the Complaint with a motion to dismiss for failure to state a claim. By order dated April 9, 1999, the Honorable Irma E. Gonzalez denied the motion. The Government and White Rail subsequently entered into a stipulation approved by the Court that provides that the federal tax liens on the property are superior to and take priority over any interest White Rail holds on the Property. (Plt's Mot. for Default Judg't and Foreclosure Exh. 1.) The stipulation and order also provides that the Property can be sold with the proceeds of the sale first used to satisfy the federal tax liabilities of the Boyces. *Id.*

The Boyces filed an answer to the Complaint on January 26, 1999. Defendant State of California Franchise Tax Board filed an answer to the Complaint on February 23, 1999. Defendants Northern Plains Service and the Trust were served by publication following unsuccessful attempts at personal service. (Plt's Mot. for Default Judg't and Foreclosure Exh. 2.) The Trust and Northern Plains Service did not respond to the Complaint and upon Plaintiff's request, the Clerk of the Court entered default against them on July 6, 1999. Defendants Rob Tanner and

Land Title Insurance Company were not served. In a brief in response to the Court's order to show causing hearing to dismiss for want of prosecution, the Government consented to dismissing those two Defendants without prejudice.

On December 23, 1999, the Government filed a motion for partial summary judgment on the first and second causes of action to reduce to judgment tax assessments against the Boyces. In this motion, the Government raised two issues: (1) whether the Tax Court's ruling on the Boyces' income tax liabilities for the years 1979-84 is *res judicata* on the amount of those liabilities; and (2) whether the Boyces could present any evidence to overcome the presumption of correctness afforded the IRS Forms 4340[3] submitted for the subject liabilities. The Boyces defended against this motion in part by asking for a continuance and additional discovery, and arguing that the Forms 4340 do not accurately reflect monies the Boyces paid the IRS. According to the Boyces, the IRS has recovered nearly $85,000.00 from them but the IRS Forms 4340 reflect the Boyces have paid only $39,409.02. The Government subsequently represented to the Court both orally and in

[3] Forms 4340 are derived from coded information in the taxpayer's IMF contained in the IRS's computer system. *Rossi v. United States*, 755 F. Supp. 314, 316 n.4 (D. Or. 1990). An IMF, or individual master file, is the file maintained by the IRS that includes transactions on an individual's tax accounts, including Forms 1040 and related documents. Robert Sellers Smith *West's Tax Law Dictionary* at 450 (West 2000). The individual master file is written in coded form, and a code book referred to as the "ADP" is used to decipher the code. *United States v. Burford*, 889 F.2d 1406, 1407 (5th Cir. 1989); Maloney Decl. ¶ 2.

writing that it would withdraw its alternative argument that the Certificates are presumptively valid.

By order dated March 22, 2000, Judge Gonzalez granted the Government's motion for partial summary judgment on its first and second claims, holding that the Tax Court's 1990 Order and Decision that held that the IRS correctly calculated the tax deficiencies assessed against the Boyces in its Statutory Notices of Deficiency, is *res judicata* regarding the tax deficiencies assessed against the Boyces. Based on the Government's withdrawal of its argument regarding the validity of the Forms 4340, the Court denied the Government's motion for partial summary judgment on that issue as moot and without prejudice to the issue being raised by either party after additional discovery was conducted. Judge Gonzalez also denied the Boyces' motion to continue. In the order Judge Gonzalez expressly noted that the remaining issues between the parties are: (1) the assessments levied and created by the IRS; (2) the validity of the IRS Forms 4340; and (3) the Government's third cause of action for relief from fraudulent conveyances.

The Boyces moved for clarification and reconsideration of Judge Gonzalez's order. By order dated May 18, 2000, Judge Gonzalez granted the Boyces' motion for clarification and amended her earlier summary judgment order. The Court denied the Boyces' for reconsideration of her order. The Boyces subsequently filed a motion to amend their answer. Judge Gonzalez granted that motion by order file-stamped on July 20, 2000, and directed the Clerk of the Court to file the Boyces' proposed amended answer.

DISCUSSION

Presently before the Court are: (1) the Government's renewed motion for partial summary judgment on the issue of the validity of the IRS Forms 4340; (2) Government's motion for default judgment and judgment by stipulation on its third cause of action for foreclosure of federal tax liens; (3) the Boyces' motion for summary judgment and quiet title; and (4) the Boyces' motion to amend the answer. The Court will discuss each of these motions, including the parties' motions relating to evidentiary matters, below.

I. The Boyces' Motion to Amend.

The Boyces' have filed a motion seeking leave to file a second amended answer to add a counterclaim for quiet title relief. The Boyces argue they should be granted leave to amend in light of the liberal standard of Federal Rule of Civil Procedure 15(a)[4]. They further state that they filed their original answer while they were *pro se*, and that the Court has allowed them to amend their answer once. The Boyces also contend the quiet title claim does not add any new questions to this case as the Government is seeking to foreclose on the Property and thereby has made title to any property in which the Boyces have an interest at issue in its own request for relief. Thus, the Boyces contend, the Government cannot claim prejudice nor surprise by the quiet title claim.

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[4] Unless otherwise noted, all future citations to "Rule" shall refer to the Federal Rules of Civil Procedure.

Caselaw developed under Rule 15(a) states that in deciding a motion to amend under that rule, the Court considers four factors: (1) bad faith; (2) undue delay; (3) prejudice to the opposing parties; and (4) futility. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). In this case, the Honorable Louisa S. Porter issued a scheduling order that in relevant part set a cutoff date of September 24, 1999, to file motions to amend the pleadings. Under these circumstances, the Boyces must first make a showing of good faith under Rule 16(b) before the Court analyzes the motion under Rule 15(a). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992); *Deghand v. Wal-Mart Stores, Inc.* 904 F. Supp. 1218, 1221 (D. Kan. 1995) ("Because the plaintiff sought leave to amend her complaint after the deadline established in the pretrial scheduling order, Rule 16 of the Federal Rules of Civil Procedure is the plaintiff's first hurdle."). "'If [the court] considered only Rule 15(a) without regard to Rule 16(b), [it] would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure.'" *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999) (*quoting Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998)).

Rule 16(b) provides in pertinent part:

> [The district court] . . shall . . . after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, . . . enter a scheduling order that limits the time
>
> (1) to join other parties and to amend the pleadings;
>
> (2) to file motions; and

(3) to complete discovery.

> . . . A schedule *shall not be modified except upon a showing of good cause* and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Fed. R. Civ. P. 16(b) (emphasis added). Unlike Rule 15(a)'s analysis that focuses on the requesting party's bad faith and prejudice to the opposing party, Rule 16(b)'s "good cause" inquiry "primarily considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification." *Id.* The Court may allow a post-deadline amendment if the deadline could not reasonably have been met despite the diligence of the moving party. *Id.*

To demonstrate diligence, the moving party may be required to show: (1) that it was diligent in assisting the Court in creating a workable Rule 16 scheduling order; (2) that its noncompliance with the scheduling order's deadline occurred or will occur notwithstanding diligent efforts to comply because of "the development of matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference;" and (3) that it was diligent in seeking amendment of the scheduling order once it became apparent it could not comply with the order. *Jackson*, 186 F.R.D. at 608. Finally, the Ninth Circuit has stated that "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609.

Because the Boyces seek to amend their answer to assert a counterclaim for quiet title, another rule of procedure implicated by this motion is Rule 13(f). Under this rule, a pleader that fails to plead a counterclaim "through oversight, inadvertence, or excusable neglect, or when justice so requires," may seek leave of court to set up the counterclaim by amendment. Fed. R. Civ. P. 13(f). In assessing these factors, the Court considers the good faith of the claimant, the extent of the delay, and any danger of prejudice to the opposing party. *Pioneer Invest. Serv. Co. v. Brunswick Assocs., Ltd.*, 507 U.S. 380, 392 n.10 (1993).

As discussed above, both Rules 16(b) and 13(f) require the moving party to show good faith for the delay in seeking amendment. The Boyces' briefs, however, fail to make this requisite showing. That the Boyces were defending this action in *pro se* when they filed their original answer is not persuasive. As recently as July 2000, the Boyces moved for and were granted leave to amend their answer. Their briefs are devoid of any explanation as to why the quiet title counterclaim could not have been brought at that time. Accordingly, the Court finds that the Boyces have failed to make the requisite showing under Rules 16(b) and 13(f) of good faith, and for this reason, their motion should be denied.

Moreover, the Court finds that amendment to add a quiet title counterclaim against the government would be futile. The Boyces' quiet title claim is based on their argument that the statute of limitations has passed for collection of certain debts alleged by the Government. As the Government has persuasively argued in its opposition to this motion and in opposition to the Boyces' motion for partial summary judgment, the statute of limitations on collection has not expired. In support of their argument,

the Boyces cite IRC § 6502. That section provides a 10-year statute of limitations for the *collection* of assessed taxes:

> [w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun –
>
> (1) within 10 years after the assessment of the tax,. . . .

IRC § 6502(a). The Boyces state that their individual master file ("IMF") shows assessment statute expiration dates that are all more than ten years before the date this action was filed.

But the Boyces' argument is unpersuasive. First, the Boyces fail to present any authority that the statute of limitations for assessment and collection is set by the IMFs. Rather, as pointed out by the Government, the applicable statutes of limitations are from the Internal Revenue Code. The statute of limitations for the *assessment* of taxes is provided by IRC § 6501, which imposes a three-year statute of limitations from the date the return is filed. IRC § 6501(a). Where a taxpayer files a false return, fails to file a return, or willfully attempts to evade tax, a tax may be assessed at any time. IRC § 6501(c). Here, the 1040 Forms the Boyces filed for 1979, 1980, and 1981 do not constitute "returns" because by stating "object" in responding to questions relating to income, the 1040 Forms do not contain sufficient information from which the Boyces' tax liability could be calculated. *See Bufferd v. Commissioner*, 506 U.S. 523, 528 (1993) (noting

that "tax returns that lack the data necessary for the computation and assessment of deficiencies generally should not be regarded as triggering the period of assessment.") (internal quotations omitted); *United States v. Kimball*, 925 F.2d 356, 357-58 (9th Cir. 1991) (en banc) (holding that a 1040 Form containing only asterisks did not constitute a "return"); *c.f. Hess v. United States*, 785 F. Supp. 137, 138-39 (E.D. Wash. 1991) (finding that a Form 1040 containing "-0-" in all critical lines and asking for a refund of the amount withheld constituted a "return," and that a 1040 Form that stated "Fifth Amendment" for gross income did not constitute a "return."). In 1982, 1983, and 1984 the Boyces simply failed to file returns. Accordingly, because the Boyces did not file proper returns, the statute of limitations under IRC § 6501 did not begin to run against the Government to make an assessment. Here, the earliest jeopardy assessment was made on January 19, 1989. (Darmstadter (12/23/99) Decl. Exhs. F, G.) Because this action was commenced on January 7, 1999, it was brought within the applicable collection statute of limitations with respect to all the subject assessments for tax and other additions.

Accordingly, for the foregoing reasons, the Boyces' motion to file an amended answer [Docket Nos. 126, 127] is **DENIED**.

II. Legal Standard for Summary Judgment

Rule 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if

the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of establishing an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where the party moving for summary judgment does not bear the burden of proof at trial, it may show that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at 325. The moving party is not required to produce evidence showing the absence of genuine issue of material fact, nor is it required to offer evidence negating the moving party's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). Rather, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885 (*quoting Celotex*, 477 U.S. at 323).

In contrast, when the moving party bears the burden of proof at trial, it cannot obtain summary judgment unless it presents evidence so compelling that no rational jury would fail to award judgment for the moving party. *See, e.g., Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1998). If the moving party fails to discharge this initial burden, summary judgment must be

denied and the court need not consider the non-moving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

Once the moving party meets the requirements of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The non-moving party does not meet this burden by showing "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The United States Supreme Court has held that "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Anderson*, 477 U.S. at 252. Accordingly, the non-moving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Id.* at 256. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 325.

When ruling on a summary judgment motion, the Court must examine all the evidence in the light most favorable to the non-moving party. *Id.* The Court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the jury. *Anderson*, 477 U.S. at 255.

III. The Parties' Summary Judgment Motions and Evidentiary Motions.

Judge Gonzalez's prior ruling – that the Tax Court's decision holding that the IRS correctly calculated the tax deficiencies against the Boyces in its Statutory Notices of Deficiency is *res judicata* in this action – is the law of the case and not subject to further dispute. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (holding that once a court decides upon a rule of law, that decision continues to govern the same issues in subsequent stages in the litigation); *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995) (holding that although the law of the case is discretionary, a court's prior decisions should be followed unless the decision is clearly erroneous or would work a manifest injustice). Accordingly, the crux of the parties' dispute in the summary judgment motions is the amount of money the IRS can collect on the subject liabilities. Briefly, the Government maintains that it has presented evidence – the Forms 4340 – that establish: the subject liabilities were assessed (under IRC §§ 6201-03); that notice and demand for payment of the taxes was properly made (under IRC §§ 6303(a) and 6321); and that the Boyces are presumptively liable for the unpaid taxes, penalties, and interest as shown on those Certificates. The Boyces do not deny a tax liability in some amount. But instead they contend the Forms 4340 are suspect and are inadmissible, that these Certificates do not accurately reflect all credits made towards their tax liability, that the Government has not properly shown what interest is due, and that the they [sic] should not be subject to penalties and interest because they were validly exercising their Constitutional rights.

A. Whether the Forms 4340 Accurately Reflect the Boyces' Tax Liabilities.

The Government bears the initial burden in an action to collect taxes and can satisfy that burden by introducing into evidence a properly certified tax assessment. *United States v. Janis*, 428 U.S. 433, 440-41 (1976); *Oliver v. United States*, 921 F.2d 916, 919 (9th Cir. 1990); *Hauf v. IRS*, 968 F. Supp. 78, 82 (N.D.N.Y. 1997). "Once introduced, the tax assessment is accorded a presumption of correctness" and the taxpayer bears the burden of showing with contrary evidence that the IRS incorrectly calculated the tax deficiencies. *I&O Publ'g Co. v. Commissioner*, 131 F.3d 1314, 1317 (9th Cir. 1997); *Oliver*, 921 F. 2d at 919; *Hauf*, 968 F. Supp. at 82. Certificates are sufficient in the absence of contrary evidence to establish that assessments were properly made and to establish the adequacy and propriety of notices of intent to levy. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993); *Hughes v. United States*, 953 F.2d 531, 535, 540 (9th Cir. 1992); *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984); *Gentry v. United States*, 962 F.2d 555, 557 (6th Cir. 1992).

In support for its original and renewed motions for partial summary judgment, the Government submitted certified copies of Forms 4340 for James and Shelley Boyce for the tax years 1979 to 1984. (*See* Darmstadter (12/23/99) Decl. Exhs. K-P.) These Certificates establish that James Boyce has been assessed $290,761.96 (excluding interest) in unpaid taxes and penalties, and Shelley Boyce has been assessed $227,249.98 (excluding interest) in unpaid taxes and penalties. This evidence discharges the Government's initial burden. The Boyces, therefore, have the burden of showing with contrary evidence that

the amounts calculated in these Certificates are incorrect. As discussed below, they cannot make this showing.

1. Admissibility of the Forms 4340.

The Boyces first argue that the Certificates on which the Government relies do not have proper foundation and have filed a motion to strike them from evidence. (*See* Defendants' Motion to Strike Exhibits K through P to the Declaration of Henry Darmstadter.) In support, the Boyces first argue that the Government has failed to establish the Certificates' authenticity because they state that the signature of "Jim Grimes" is "required for certification" but "E.M. Washington" has signed instead. The Boyces state that nothing presented by the Government shows that E.M. Washington has replaced Jim Grimes or has the authority to sign the Certificates that are in the record. The Boyces also argue that the Certificates themselves contain no declaration under penalty of perjury or testimony under oath. The Government responds that this argument is frivolous. The Court agrees.

The IRS used a Form 2866, entitled "Certificate of Official Record" to certify the authenticity of each Form 4340 that has been submitted into evidence. (Darmstadter (12/23/99) Decl. Exhs. K-P.) The individual who authenticated these forms – Washington – was delegated the authority to authenticate the Certificates. (Darmstadter (6/16/00) Decl. Exh. U.) Moreover, the Forms 4340 are admissible because [sic] fall within the public records exception to the hearsay rule, Federal Rule of Evidence 803(8). *Hughes*, 953 F.2d at 539-40; *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993). These forms are also self-authenticating public documents under Federal Rule

of Evidence 902(1) because they are certified under seal. *See Hughes*, 953 F.2d at 539-40. The Ninth Circuit has approved the use of the Form 2866, and has also held that IRS Forms 4340 are admissible even though they are a computer-generated document prepared exclusively for litigation purposes. *Hansen*, 7 F.3d at 138; *Hughes*, 953 F.2d at 539-40. This Court may therefore consider the Forms 4340 notwithstanding the Boyces' challenge to their certification. *See Laughlin v. United States*, 99-2 USTC ¶ 50,933 (S.D. Cal. 1999), (denying plaintiff's motion to strike Forms 4340 on the grounds the Certificates were authenticated by an authorized individual and are admissible under Federal Rule of Evidence 803(8)); *aff'd*, 2001-1 USTC ¶ 50,150 (9th Cir. 2000).

2. Conformity of the October 1999 Certificates to a February 15, 1991, Certificate.

The Certificates the Government has relied on its original and instant motions for partial summary judgment are dated October 20, 1999. In discovery, the Government provided the Boyces a Certificate dated February 15, 1991.[5] The Boyces contend the 1991 Certificate differs from the October, 1999 Certificates. In support, the Boyces have attached as Exhibit 26 a table showing selected entries on the October Certificates that do not appear on the 1991 Certificate even though those entries allegedly pre-date February 15, 1991. (Shepard (8/14/00) Decl. Exh.

[5] The Boyces submitted a copy of this February 15, 1999, Certificate as Exhibit F to their Statement of Material Facts in Opposition to the Government's original motion for partial summary judgment.

26.) According to the Boyces, the fact these entries do not appear on the February 15, 1991 Certificate, the October Certificates are not complete and accurate.

As an initial matter, the Court notes that while the Boyces' counsel has submitted a declaration explaining what Exhibit 26 is, that declaration does not properly authenticate the exhibit as required by Federal Rules of Evidence 901.[6] More importantly, as the Government points out, the discrepancies between the October 1999 Certificates and the February 15, 1991 Certificate is primarily due to the fact that a Form 4340 only includes assessments actually made by the IRS. *Ghandour v. United States*, 37 Fed. Cl. 121, 125-26 (Fed. Cl.), *aff'd*, 132 F.3d 52 (Fed. Cir. 1997). Indeed, the Certificates themselves read that they are "a true and complete transcript for the periods stated, of all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payments relating thereto as disclosed by the records of this office *as of the date of this certification*." (Darmstadter (12/23/99) Decl. Exhs. K at 5, L at 5, M at 4, N at 5, O at 4, P at 10) (emphasis added). Contrary to the Boyces' arguments, almost all of the entries the Boyces challenge were not assessed until *after* February 15, 1991.

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[6] The Court notes that the Boyces have filed an *ex parte* application to file Second Declaration of James M. Boyce and Shelley A. Boyce *nunc pro tunc* to September 18, 2000. This declaration was inadvertently omitted from the Boyces' reply brief papers filed on September 18, 2000. (Shepard (12/11/00) Decl. at 1.) Having reviewed the *ex parte* application and good cause appearing, the application is hereby **GRANTED**.

The Boyces' Second Declaration also does not authenticate Exhibit 26. Indeed, it states that exhibit was prepared by counsel. (Second James and Shelley Boyce Decl. ¶ 3.)

This is evidenced by the assessment dates for the entries, which are in the far right-hand corner of the Certificates. (*See* Darmstadter (12/23/99) Decl. Exhs. K-P.) All of the entries for penalties and interest that appear on James Boyce's October Certificates for the period ending 12/31/79, 12/31/80 and 12/31/81, and 12/31/83 and 12/31/84 and that the Boyces challenge were assessed on June 3, 1991. (*See* Darmstadter (12/23/00) Decl. Exhs. K at 4, L at 4, N at 3-5.) Similarly, the entry for $8,258.63 on James Boyce's October Certificate for the period ending 12/31/82 that the Boyces challenge was also assessed on June 3, 1991. (*See* Darmstadter (12/23/00) Decl. Exh. M at 3.) Because these challenged assessments were not made until almost four months later, they did not appear on the February 15, 1991 Certificate. Accordingly, the Boyces' reference to these interest and penalty assessments fails to impugn the accuracy of the Forms 4340 before the Court.

The final two entries the Boyces challenge – the $24.00 miscellaneous penalty and $5.00 estimated tax penalty on the October Certificate for the period ending 12/31/82 – were assessed prior to February 15, 1991. (*See* Darmstadter (12/23/00) Decl. Exh. M at 3.) Nevertheless, they can be explained by simply comparing the October Certificates with the February 15, 1991, certificate. On the February 15, 1991, Certificate, the miscellaneous penalty received and assessed on 01/19/89 is $3,892.00. (Boyces' (01/26/00) Statement of Material Facts Exh. F.) On the October 1999 Certificate, the miscellaneous penalty assessed on 01/19/89 is put into two entries for the same date; one is $3,868.00, and the second is the challenged entry of $24.00. (Darmstadter (12/23/00) Decl. Exh. M at

3.) Adding the two sums equals $3,892.00 – the miscellaneous penalty noted on the February 15, 1991, Certificate. Similarly, the February 15, 1991 Certificate assessed an estimated tax penalty of $1,511.00 (Boyces' (01/26/00) Statement of Material Facts Exh. F.) The October 1999 Certificate divides the estimated tax penalty into two entries; one for $1,506.00 and the other, challenged entry for $5.00. (*See* Darmstadter (12/23/00) Decl. Exh. M at 3.) Adding the two sums equals $1,511.00, the estimated tax penalty noted on the February 15, 1991, Certificate.

In short, having reviewed the Boyces' Exhibit 26, the February 15, 1991, Certificate, and the October 1999 Certificates, the Court finds there are no discrepancies as the Boyces have alleged, and therefore this argument fails to show there is a triable issue of material fact as to the accuracy of the October Certificates.

3. Conformity of the Certificates to the Tax Court Judgment and IMF Files.

The Boyces concede that the Certificates agree with the Tax Court judgment as it relates to the tax owed and estimated tax penalties, but in all other respects, such as the "fraud penalties," the Boyces contend the Certificates reveal internal discrepancies with the Tax Court decision and with the IMF transcripts provided by the Government. IRS employee James Maloney testified that the Certificates are prepared from information contained in the IMFs. (Maloney Depo. at 12:21-24.) The Boyces argue that the IMFs, not the Certificates, are therefore the "official record" of a taxpayer's account. The Boyces have attached an exhibit that compares the penalty and interest entries on the IMFs and the Certificates. (Shepard (8/14/00) Decl. Exh. 24.) The Boyces state their Exhibit 24

shows that the Certificates reflect penalties and interest claimed against the Boyces, and not shown on the IMFs, in the amount of $539,125.88. Because the IMF is the "official record" of a taxpayer's account, the Boyces argue it should be given greater weight than a Certificate. In their opposition to the Government's motion for partial summary judgment and in their own motion for partial summary judgment, the Boyces did not present any facts or detailed arguments to support their position the Certificates do not comport with the Tax Court Judgment. But in their reply for their summary judgment motion, the Boyces list various purported discrepancies they contend exist between the Tax Court judgment and the Certificates.

Having carefully reviewed the evidence, the Court finds the Boyces's arguments that the Certificates do not conform to the Tax Court judgment and the IMFs fail to raise a triable issue of material fact regarding whether the Forms 4340 are accurate. As an initial matter, as with their Exhibit 26, the Boyces' Exhibit 24 has not been properly authenticated as required by Federal Rule of Evidence 901. The Boyces appear to suggest it is not necessary that the exhibit be authenticated because that exhibit was prepared by Defense counsel and his investigator by copying selected information from the Certificates and IMFs. (Boyces' Reply at 9 n.17.) Thus, the Boyces' contend, the exhibit does not offer any new evidence. (Second James and Shelley Boyce Decl. ¶ 12.) The Boyces, however, have not presented any authority to the Court to suggest that an "illustrative" exhibit need not comply with the Federal Rules of Evidence. Furthermore, even if this Court were to consider Exhibit 24, it fails to support the Boyces' argument. The Boyces simply list entries from the

Certificates and then list entries from the IMF forms, without explaining how the latter show there are mistakes in the former. There is no argument as to how those numbers impugn the calculations made in the Certificates.

The Court further finds that the Boyces' list of purported discrepancies between the Tax Court Judgment and the Certificates cannot be properly considered by the Court. This argument was not presented in their moving papers and therefore should not be considered now, as it is improper for a party to raise a new argument in a reply brief. *See, e.g.*, *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (noting that courts generally decline to consider arguments raised for the first time in a reply brief); *United States v. Boggi*, 74 F.3d 470, 478 (3d Cir. 1996) (noting that considering arguments raised for first time in reply brief deprives opposing party of adequate opportunity to respond); *Playboy Enters., Inc. v. Dumas*, 960 F.Supp. 710, 720 n.7 (S.D.N.Y. 1997) ("Arguments made for the first time in a reply brief need not be considered by a court."). Further, as with the purported discrepancies between the IMF and Certificates, the Boyces's simply list the alleged discrepancies without accounting for the fact that the Certificates reflect additional assessments and adjustments so they would conform to the Tax Court's decision.

Finally, the most significant infirmity with the Boyces' arguments that the Forms 4340 do not conform to the Tax Court Judgment and IMFs is that the Boyces did not present this argument in response to contention interrogatories the Government propounded following Judge Gonzalez's March 22, 2000, order. As discussed above, Judge Gonzalez denied without prejudice the Government's motion for partial summary judgment on the validity of

the Forms 4340. The parties were given additional time to conduct discovery into the Boyces' argument the Certificates are not accurate. Indeed, shortly after Judge Gonzalez's March 22, 2000, order, the Government propounded contention interrogatories requesting the Boyces to support their position that the Forms 4340 are inaccurate. (Darmstadter (6/16/00) Decl. Exh. S.) The Boyces' response to these interrogatories was as follows:

> Objection. This interrogatory calls for a legal conclusion by the Defendants. Further, this inquiry seeks information that is non-discoverable attorney work-product.
>
> Without waiving the objections the Defendants state that the identified Exhibit appears to have been signed by an improper party, and is therefore suspect of authenticity. It is also a summary document allegedly derived from another summary document (Individual Master File), for which the government or its employees have either lost or destroyed most of the original source documents. Summary documents are, by their very nature, incomplete. This lack of completeness makes the validity and accuracy of the said Exhibit difficult, if not impossible, of verification.

(Darmstadter (6/16/00) Decl. Exh. T.) Because the Boyces did not inform the Government in discovery, as requested, their position that the Forms 4340 do not conform with the Tax Court Judgment and IMFs, the Government argues the Court should not consider these arguments under Rules 26(e) and 37.

This Ninth Circuit holds that it is the taxpayer's obligation to present a cognizable argument how the IRS

erred in calculating tax deficiencies. *I&O Publ'g*, 131 F.3d at 1317. The Government's contention interrogatories were aimed at learning the basis for the Boyces' arguments that the Forms 4340 incorrectly calculate the Boyces' tax deficiencies. Indeed, Judge Gonzalez's March 22, 2000, order required the parties to contact the Honorable Louisa S. Porter to finalize a schedule for discovery of this issue. The Boyces' argument that the Government was not entitled to discovery on this issue is meritless. Under Rule 33(c), a party can serve an interrogatory the answer to which involves "an opinion or contention that relates to fact or the application of law to fact." Fed. R. Civ. P. 33(c); *O'Connor v. Boeing North Am., Inc.*, 185 F.R.D. 272, 280-81 (C.D. Cal. 1999). The Government's contention interrogatories are not directed to issues of "pure law" that would infringe on the attorney-work product doctrine as codified in Rule 26(b)(3). Rather, they seek the *facts* upon which the Boyces' relied for their defense to the Forms 4340. As such, the contention interrogatories were permissible and the Boyces were required to respond to them. "Moreover, requiring the answer to these contention interrogatories is '[c]onsistent with Rule 11 of the Federal Rules of Civil Procedure, [which requires that] plaintiffs must have some factual basis for the allegations in their complaint. . . .'" *O'Connor*, 185 F.3d at 281 (*quoting In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 8 (D. Me. 1991))

The Boyces' further contend that Rule 26(e) does not apply because the central purpose of that rule is to prevent unfair surprise at trial and there is no trial date in this case, and also because they are *currently* supplementing discovery in the motions before the Court. Under Rule

26(e), a party has a "duty seasonably to amend" interrogatory responses "if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(2). The Boyces have not presented any authority to support their argument that Rule 26(e) allows them to wait until the eve of trial to supplement their discovery responses.

The Boyces' responses to the relevant interrogatories do not explain in any way their contention that the Certificates at issue do not accurately reflect all credits for payments they made on their tax liabilities. As such, these responses are incomplete and evasive. In light of Judge Gonzalez's order directing the parties to plan a schedule for discovery into, *inter alia*, this very issue, and the duty to supplement responses under Rule 26(e)(2), the Court will exercise its inherent authority and decline to review the Boyces' arguments that the Certificates are inconsistent with the IMFs and Tax Court Judgment. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1982).

4. Whether the Forms 4340 Reflect All Credits.

As in their opposition to the Government's original motion for summary judgment, the Boyces contend the Government has not properly credited them for all monies received. In its moving papers, the Government argues that the Boyces have not produced any evidence in discovery to show that they made tax payments that are not properly reflected in the Forms 4340. For example in James Boyce's deposition, he could not identify any

particular payments and admitted that he had never performed a proper accounting. (James Boyce Depo. at 16:11-31:15.) Shelley Boyce was also unable to identify a single payment that was made that was not reflected as a credit on the Forms 4340. (Shelley Boyce Depo. at 11:10-16:14.) In addition, the Boyces' interrogatory responses were not able to identify payments or other credits which should be applied to their tax liabilities. (Darmstadter (6/16/00) Decl. Exhs. T, V, W.)

At their deposition, the Boyces presented the Government with several documents they contended reflected payments on their tax liability. These documents are attached to the Boyces' deposition transcript as Exhibit L. The Boyces did not question Gregory Yarbrough, the Internal Revenue Officer who was assigned to investigate their federal tax delinquencies, on whether the credits reflected in Exhibit L's documents were all accounted for in the Forms 4340.[7] (Yarbrough Depo. 65:3-24.) In support

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[7] At the end of Yarbrough's deposition, the following exchange took place between Richard Shepard, the Boyces' counsel, and the Government's attorney, Henry Darmstadter:

> MR. SHEPARD: Well, I have completed my questions and I am prepared to go to the stipulation or discuss what we are going to do about –
>
> MR. DARMSTADTER: Before we do that, I want to at least put on the record that I am really shocked that we aren't going through any of the application of any of the payments, which I though [sic] was an issue in this case.
>
> MR. SHEPARD: I am not saying it isn't.
>
> MR. DARMSTADTER: But you don't want to – He would be the individual to ask as to allocation of payments, so –

(Continued on following page)

of its motion for summary judgment, the Government has presented a declaration by Yarbrough where he reconciles the payments shown in the documents in Exhibit L with the payments as reflected on their IMF transcripts and Forms 4340.

The Boyces' respond to Yarbrough's declaration by attempting to impugn Yarbrough's credibility, arguing that he has not handled the Boyces' collection file for six and possibly eight or nine years. They further question his ability to recall the fees the banks charged in 1989 and 1992 for purposes of his declaration when he could not recall during his deposition the dates he had posted notices of jeopardy assessment on the Boyces' house. In addition, the Boyces argue that Yarbrough is speculating in his declaration and that he has not been qualified as an expert witness.

The Court does not find the Boyces' arguments persuasive. As an initial matter, the Boyces have waived any arguments questioning the validity of Yarbrough's reconciliation of the Certificates and IMFs with the documents in Exhibit L by declining to question him on this issue.

MR. SHEPARD: He can say that when you want to put him on the stand or when you want – I mean, if you want to ask him now, you can ask him.

MR. DARMSTADTER: I realize that. Are there any application of payments that you are confused about at this point in time?

MR. SHEPARD: Well, I am not going to tell you what I am confused on or what I am clear on. I am telling you that I am not asking those questions. If you want to ask them, you can.

(Yarbrough Depo. at 65:3-24.)

Further, Yarbrough has been a Revenue Officer since 1984 and was assigned a Taxpayer Delinquency Investigation for the Boyces. (Yarbrough Decl. ¶¶ 1,2.) Yarbrough's declaration reconciling the amounts reflected in Exhibit L's documents is based on his review of those documents and the IMFs and Forms 4340. (Yarbrough Decl. ¶¶ 8-9.) For example, the bank fees that Yarbrough discusses are listed on the documents the Boyces presented in Exhibit L. (*E.g. compare*, Boyces' Depo. Exh. L at 17 *with* Yarbrough Decl. ¶ 18; Boyces' Depo. Exh. L at 20 *with* Yarbrough Decl. ¶ 19.) Accordingly, Yarbrough is competent to present evidence on this issue. Finally, the Boyces have not presented any evidence showing that Yarbrough's declaration incorrectly reconciles the documents in Exhibit L with the IMFs. Accordingly, the Exhibit L documents fail to present a triable issue of material fact regarding the accuracy of the Certificates.

In connection with these motions, the Boyces have attached as Exhibit 23 nine additional bank statements that purportedly reflect more payments on their tax liabilities. These documents, however, were not provided in discovery. Even though the Boyces did not have these documents when they were deposed, they had a continuing duty to supplement their document production under Rule 26(e)(2). In addition, as discussed above, Judge Gonzalez's March 22, 2000, order contemplated the parties conducting discovery on the Boyces' argument they were not credited all monies received. These documents, therefore, can be precluded from consideration under the Court's inherent authority.

Assuming the documents in Exhibit 23 are properly before the Court, they nevertheless fail to raise a triable issue of material fact regarding the accuracy of the Forms

4340. The Boyces have failed to establish that these documents prove the Forms 4340 do not reflect all credits from their payments. For example, on the second page of Exhibit 23, the top "Memorandum Charge – Checking" reflecting a $17.25 levy on May 13, 1992 is accounted for as a credit on James Boyces' Form 4340 for the tax period ending 12/31/80. (*Compare* Shepard (8/14/00) Decl. Exh. 23 at 2 *with* Darmstadter (12/23/99) Decl. Exh. L at 4.) Further, a review of these documents shows the Boyces have not shown that all of the amounts reflected in the documents in Exhibit 23 are in fact IRS levies. For example, the Boyces have not shown the first three statements reflecting levies on Shelley Boyce's Bank of America account are IRS levies. None of the IRS's Notices of Levy in the Exhibit L to the Boyces' deposition transcript are directed towards Bank of America. (Boyces' Depo. Exh. L.) It is possible that these levies were by the State of California Franchise Tax Board, which also has liens against the Boyces' Sleeping Indian Road property.

5. Whether the Boyces Have Been Provided All Relevant Evidence.

The Government states that since Judge Gonzalez's March 22, 2000, order, it has provided the Boyces with extensive discovery. Specifically, the Government argues it has provided copies of the Boyces' IMF transcripts for the years 1979-84, a version of the ADP code book necessary to decipher the IMF transcripts, and certified copies of the Forms 23(C) (Summary Record of Assessments) for the periods at issue. (Darmstadter (6/16/00) Decl. ¶ 2.) In addition, the Government argues that pursuant to Rule 30(b)(6), the Boyces deposed James Maloney, special Procedure Advisor in the Collection Division of the IRS in

San Diego. (Darmstadter (6/16/00) Decl. ¶ 3.) The Boyces received copies of all available documents pertaining to the collection of the subject tax liabilities, including Notices of Levy, copies of checks, and various IRS Payment Posting Vouchers. (Darmstadter (6/16/00) Decl. ¶ 4.) The Boyces also deposed Yarbrough, the principal IRS Revenue Officer involved with the collection on the subject jeopardy assessments. (Darmstadter (6/16/00) Decl. ¶ 5; Yarbrough (6/16/00) Decl. ¶ 2.) Finally the Government issued subpoenas to the banks where the Boyces indicated they had maintained accounts during the time periods at issue. (Darmstadter (6/16/00) Decl. ¶ 5 and Exh. R attached thereto.)

The Boyces respond that while the Government has provided the Boyces' "administrative file" from the IRS Examination Division, it has failed to provide the "collection file" from the IRS Collection Division. Yarbrough testified at his deposition the collection file was destroyed. (Yarbrough Depo. at 45:24-64:12.) The Boyces argue that this "collection file" would likely have contained important evidence probative of: (a) the total amounts collected by the IRS in general and Yarbrough in particular; (b) the application of the amounts collected to particular years; and (c) the procedures followed and forms used by Yarbrough in providing notice and executing the 1989 jeopardy assessment and other tax levies against third parties. The Boyces maintain their collection case file should have been kept for 10 years as required by the Internal Revenue Manual. Because their collection file was destroyed, the Boyces argue they are entitled to summary judgment or in the alternative, to have the Certificates stricken from evidence.

The Government contends that Yarbrough's June 16, 2000, declaration shows the Boyces' file was handled in accordance with IRS records control policy, and that it was pursuant to that policy that the Boyces' file was destroyed. (*See* Yarbrough Decl. ¶ 7.) The Government states that the Boyces are incorrect when they assert that the Internal Revenue Manual provides that the records are to be maintained for ten years and that they are also mistaken that the original Collection Case File was destroyed at the request of Yarbrough. The Government further argues the Boyces are incorrect that a Notice of Levy is an evidence of payment. The Government explains that a Notice of Levy is merely a demand for payment, and the party responding to the levy is not obligated to provide payment unless it is in possession of property or rights to property of the taxpayer. *See* IRC § 6332.

The Court is not persuaded by the Boyces' arguments. First, one Circuit has rejected taxpayers' argument that they [sic] entitled to all original documents used by the IRS to prepare a summary record of assessments. *Gentry*, 962 F.2d at 558. In so doing, the Court held that neither the Tax Code nor the Treasury Regulations require that taxpayers be given original documents regarding assessments. *Id.* The Court further found that the IRS Certificates of Assessments and Payments provided to the taxpayers comported with the Treasury Regulations' requirements. *Id.*

Second, courts have rejected arguments that taxpayers are released from any tax liabilities because IRS records have been destroyed or are otherwise missing. For example, in *Zolla*, the United States brought an action to reduce to judgment a taxpayer's federal income tax liabilities. neither the United States nor the taxpayer

introduced direct evidence of the taxpayer's income and deductions for the years at issue. *Zolla*, 724 F.2d at 809. Pursuant to routine procedure, the IRS had destroyed all copies of notices of deficiency and demands for payment that had been mailed to the taxpayer. *Id.* at 810. The taxpayer argued the presumption of correctness that attaches to the IRS' determinations of a tax deficiency should not apply because there was insufficient evidence the Government mailed the statutory notices of deficiency. *Id.* at 809-10. The taxpayer did not present any evidence to contradict the Government's evidence of a postal form 3877 certifying that the notices of deficiency had been mailed and an IRS form certifying that the taxes and section 6651(a)(3) failure-to-pay penalties had been assessed. *Id.* at 810. The Ninth Circuit rejected the taxpayer's challenge, and held that the certified transcripts "are highly probative, and are sufficient, in the absence of contrary evidence, to establish that the notice and assessments were properly made." *Id.*

Similarly, in *United States v. Ahrens*, 530 F.2d 781 (8th Cir. 1976), the taxpayer argued that the IRS did not Comply with established procedures regarding mailing statutory notices of deficiency. *Ahrens*, 530 F.2d at 782. The parties did not have copies of the statutory notices of deficiency as they had been lost. *Id.* The Government, however, offered a copy of post office Form 3877 that stated the statutory notices of deficiency had been mailed, as well as a letter from the taxpayer's attorney that corroborated the information in the Form 3877. *Id.* at 784-85. Because the taxpayer had not presented any rebuttal evidence indicating the notices had not been mailed, the Court held that the Government had proved as a matter of law that the notices of deficiency were mailed. *Id.* at 785.

For the reasons discussed above, the Court finds that the Boyces have not presented any admissible or persuasive evidence that undermines the accuracy of the Forms 4340. Accordingly, the Court does not find the destruction of the Boyces' case collection file raises a triable issue of material fact as to the accuracy of the Certificates, entitles the Boyces to summary judgment, or requires that the Certificates be stricken from evidence.

B. Interest Calculation.

In support of its motion, the Government submitted the declaration of Julie Piazza for purposes of updating the amount of interest owed by the Boyces on the subject tax liabilities to a date certain. In so doing, the Government provided the total balance owed by the Boyces as of July 17, 2000 – the original hearing date for this motion – so that, in the event the Court granted the instant motion at the hearing, it could enter a money judgment in sum certain. The Boyces challenge Piazza's calculation that the Boyces owe $600,089.84 in interest – an amount that is nearly three times the underlying tax and penalty assessments combined. The Boyces contend the Government provides no method for determining the accuracy of this interest calculation, and have filed a motion to strike Piazza's declaration or in the alternative, leave to reopen discovery so they can depose Piazza on her declaration.

As pointed out by the Government, the amount of interest owed the Government on underpayment of taxes is provided by the Internal Revenue Code. Accordingly, the amount of interest owed is a matter of law, not of evidence. *Ghandour*, 37 Fed. Cl. at 127. Internal Revenue Code section 6601(a) provides for interest on underpayment of

tax, and interest on underpayments accrues from the last date prescribed for payment until paid. IRC § 6601(a); *Ghandour*, 37 Fed. Cl. at 126-27. Internal Revenue Code section 6601(e)(2) entitles the Government to interest on penalties and other additions on tax. IRC § 6601(e)(2); *Ghandour*, 37 Fed. Cl. at 126-27. Because interest on assessments and penalties are mandatory under the Internal Revenue Code, the Court finds that the significance of Piazza's declaration was only to allow the Court to render judgment in a specific dollar amount and does not open the door to discovery on the amount of interest the Boyces owe. *See United States v. Schroeder*, 900 F.2d 1144, 1150 n.5 (7th Cir. 1990) ("The amount [of interest] owed [on an IRC § 6672 penalty] is a matter of law, not of evidence. It is not something the government must prove at trial."); *Ghandour*, 37 Fed. Cl. at 126-27 (noting that Internal Revenue Code provisions regarding interest are mandatory and not a matter of evidence). The Boyces' motion to strike Julie Piazza's declaration is or in the alternative, to reopen discovery is therefore **DENIED**.

C. Boyces' Constitutional Argument Against Penalties and Interest.

The Boyces contend the Certificates reflect burdensome, oppressive, and excessive fines and forfeitures upon the Boyces for their exercise of their First Amendment right to petition their Government for redress of grievances. In support, the Boyces explain that they attended several conferences beginning in 1978 that made them doubt the legitimacy of income tax laws, and they believe that the law of taxation is uncertain. Specifically, the Boyces maintain the Sixteenth Amendment is ambiguous, taxable income cannot be defined by statute, question

whether income tax is a direct tax or indirect tax, and question whether income is property. Although these arguments were rejected by the Tax Court, the Boyces present them here to show their constitutional arguments were formed after reasonable inquiry, well grounded in fact, and were good faith attempts for the modification or reversal of existing law related to income taxes. The Boyces believe that the penalties and interest assessed against them is unwarranted punishment, and contrary to the First and Fifth Amendments. In support, they cite *Cheek v. United States*, 498 U.S. 192 (1991).

In *Cheek*, the Supreme Court outlined two alternatives for an individual who challenges a federal taxing agency: (a) pay the tax the law purported to require, file for a refund and, if denied, present his claims of invalidity, constitutional or otherwise, to the courts; or (b) could have not paid the tax and challenged the tax deficiencies in tax court. *Cheek*, 498 U.S. at 206. The Boyces state that *Cheek* stands for the proposition that if a taxpayer has a frank difference of opinion with the IRS, he can employ one of the two above-listed procedures and not be penalized. Here, the Boyces state they approached the IRS several times seeking answers to their questions regarding income taxes only to have their inquiries rebuffed. Thus, the Boyces contend they should not be penalized under *Cheek*. The Boyces argue that because a person with frank differences regarding his tax liability who decides not to pay must wait for an assessment before filing his petition, he is denied due process of law as to the penalties and interest the IRS imposes in the interim (between the time the tax is owed until adjudication in the tax court). Thus, the Boyces state they have been deprived of due process by

these excessive penalties and interests, and are being punished for seeking redress of their grievances.

In a supplemental brief, the Boyces seek further support from a recent Ninth Circuit decision, *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000). The Boyces argue that *White* holds that the right to petition for redress of grievances applies even to advocacy of an illegal act not amounting to a breach of peace, and that *Noerr-Pennington* immunity applies in all contexts except labor relations. They further argue that under *White*, the tax penalties assessed against them by the Government unconstitutionally infringe upon their petition and due process rights and therefore should be voided.

The Court is not persuaded that the Boyces' constitutional challenges mandate that penalties and interest not be assessed against them. *Cheek* and *White* do not support the Boyces' arguments. *Cheek* was a criminal prosecution for tax evasion. There, the Supreme Court held that a taxpayer's mistaken reading of the tax laws may negate willfulness in a tax evasion case, but that a defendant's views bout [sic] the validity of tax statutes are irrelevant to the issue of willfulness. *Cheek*, 498 U.S. at 206; *United States v. Bonneau*, 970 F.2d 929, 931 (1st Cir. 1992). Far from providing a "safe harbor" in civil cases such as this one, *Cheek* found that a jury instruction to disregard a defendant's views on the validity of the tax statutes would be proper. *Id.* Further, *White* is inapposite as it was not a case involving unpaid federal taxes. Instead, *White* involved the Fair Housing Act and the First Amendment. *White*, 227 F.2d at 1220. There, neighbors who opposed conversion of a motel into [sic] multi-family housing unit alleged that Housing and Urban Development officials violated their First Amendment rights by investigating

the neighbors' activities. *Id.* The Ninth Circuit held that the neighbors' opposition to the conversion was protected by the First Amendment, and the investigation into the neighbors' activities unconstitutionally infringed on their First Amendment rights. *Id.* at 1226-39. The Court recognized that "a person's speech or petitioning activity is not removed from the ambit of First Amendment protection simply because it advocates an unlawful act." *White*, 227 F.3d at 1227. But nothing in the Court's opinion suggests that failure to pay taxes because of disagreements with federal taxation law is protected speech that precludes the imposition of interest and penalties.

The Boyces have not cited any persuasive authority for their position that their due process rights were violated. As *Cheek* noted, an individual who questions the validity of tax laws cannot ignore the duties imposed by the Internal Revenue Code and must utilize the mechanisms provided by Congress to present claims of invalidity. *Cheek*, 498 U.S. at 206. The Boyces have not shown that these mechanisms violate their due process rights under the rest announced in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that to determine whether procedural due process has been violated the court looks at the following factors: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used; and (3) the value of additional procedural safeguards and the cost of those safeguards to the government). Further, "[n]oncompliance with tax laws is not protected by the First Amendment." *Buck v. United States*, 967 F.2d 1060, 1062 (5th Cir. 1992); *see United States v. Lee*, 455 U.S. 252, 260 (1982) (stating that the maintenance of a functional federal tax system is a sufficiently important governmental interest to justify incidental regulation of

First Amendment rights). Accordingly, the Court does not find that the Boyces' rights to due process and to petition the Government for redress of grievances is infringed by the assessment of penalties and interest against them.

D. Summary.

Having reviewed the parties' briefs, applicable law, and the evidence, the Court finds that the Boyces have not presented any admissible or persuasive evidence that raises a factual question regarding their tax liabilities as established in the Certificates of Assessments and Payments (IRS Forms 4340) dated October, 1999. Accordingly, the Boyces' motion to strike Exhibits K-P from Darmstadter's declaration is **DENIED**. The Government's notion for partial summary judgment as to its first and second causes of action is **GRANTED**, and the Boyces' motion for partial summary judgment is **DENIED**.

IV. Boyce's Quiet Title Motion.

In conjunction with their summary judgment motion, the Boyces have moved for an order quieting title. For the reasons discussed above, the Boyces' have bee denied leave to file a quiet title claim, and the Court has found that such a claim is merit less. Accordingly, the Boyces' motion for quiet title is **DENIED**.

V. Government's Motion for Default Judgment and Judgment Pursuant to Stipulation.

A. Trust and Northern Plains Service.

The Government has filed a motion for default judgment against the Trust and Northern Plains Service.

Specifically, the Government has requested that this Court find that: (1) the Government has valid tax liens against all the property belonging to the Boyces, including the Property; and (2) the Trust and Northern Plains Service are sham entities controlled by the Boyces, or alternatively, the Boyces' alter egos, nominees, or agents for the Boyces. On this basis, the Government requests the Court enter an order that all property held by those entities, including any interest in the Property, is subject to federal tax liens against the Boyces.

To obtain default judgment under Rule 55, a plaintiff must first request entry of default from the Clerk of the Court and then apply for default judgment. *See* Fed. R. Civ. P. 55(a)-(b). A plaintiff does not receive default judgment as a matter of right; rather, a court has discretion as to whether it should be granted. *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988); *Rashidi v. Albright*, 818 F. Supp. 1354, 1356 (D. Nev. 1993); 10A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2685 at 30-31 (1998). A court may consider several factors in exercising its discretion to enter default judgment: "(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,] (5) the possibility of a dispute concerning material facts[,] (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

In this case, the Clerk of the Court entered default against the Trust and Northern Plains Service on July 6, 1999. These Defendants have not responded to this motion

for default judgment. Their failure to respond is a basis for entering default judgment against them on the Complaint's third cause of action. Under Civil Local Rule 7.1(f)(3)(c), if an opposing party fails to file the papers as required under the local rules, that failure may constitute a consent to the granting of a motion. Civ. L. R. 7.1(f)(3)(c).

Moreover, a consideration of the merits of this motion warrants entry of default judgment. The IRS may levy upon all types of property that belong to the taxpayer but are nominally held in the name of another entity or individual and that the federal ta [sic] lien provided under IRC § 6321 protects the government's interest in such property. *Don Gastineau Equity Trust v. United States*, 687 F. Supp. 1422, 1426 (C.D. Cal. 1987). Generally, the alter ego doctrine is used when an [sic] party seeks to hold an individual liable for a business entity's debts. *Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1390 (9th Cir. 1993). A "reverse piercing" theory is available where the United States seeks to recover a taxpayer's delinquent tax liability from his alter ego business entity. *Id.* The Court applies the law of the forum state in determining whether a corporation is an alter ego of the taxpayer. *Wolfe v. United States*, 806 F.2d 1410, 1411 (9th Cir. 1986), *amending* 798 F.2d 1241, 1244 n.3 (9th Cir. 1986). In California, a party relying on the alter ego doctrine must show: (1) that there is such unity of interest and ownership that the legal separateness of the individual and alter ego no longer exist and (2) that the observance of the fiction of separate existence would under the circumstance promote fraud or injustice. *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538 (2000); *Hennessey's Tavern, Inc. v. American Air Filter Co.*, 204 Cal. App. 3d 1351, 1358 (1988). In this case, these factors weigh in

favor of finding Northern Plains Service and the Trust alter egos of the Boyces. The evidence before the Court indicates that these entities were created at the Boyces' direction for holding and managing their property. Second, the inequity prong is also met because recognition of these entities would allow individuals to evade payment of taxes by simply setting up a trust or other entity to "hold" and "manage" property that the individuals are using and receiving benefit from. Accordingly, the Government's motion for default judgment against the Trust and Northern Plains Service that they are the alter egos or nominees of the Boyces is **GRANTED**. **IT IS HEREBY ORDERED** that all property held by the Trust and Northern Plains Service, including any interest in the Property is subject to federal tax liens against the Boyces.

B. White Rail.

The Government requests the Court enter judgment against White Rail in accordance with the stipulation for entry of judgment approved by the Court. White Rail has not opposed this request and, given that it would effect the intent of the parties' stipulation, the Government's motion is **GRANTED**.

CONCLUSION

For the foregoing reasons, having carefully considered the parties' briefs, the record, argument of counsel, applicable law, and good cause appearing, **IT IS HEREBY ORDERED**:

1. The Boyces' motion to amend their answer is **DENIED** [Docket Nos. 126, 127].

2. The Government's renewed motion for partial summary judgment against Defendants James Boyce and Shelley Boyce as to the Government's first and second causes of action is **GRANTED** [Docket No. 89].

a. The Clerk of the Court is directed to enter judgment against Defendant James M. Boyce, Jr., a.k.a. James Boyce in the amount of: $290,761.96, plus interest as provided by the Internal Revenue Code.

b. The Clerk of the Court is directed to enter judgment against Defendant Shelley A. Boyce in the amount of: $227,249.98, plus interest as provided by the Internal Revenue Code.

3. The Government's motion for default judgment against Defendants Jacob Family Preservation Trust, a.k.a. Jacob Family Trust and Northern Plains Service is **GRANTED**, those entities are the alter egos or nominees of the Boyces and therefore all property held by them, including the Sleeping Indian Road Property is subject to the tax liens against the Boyces [Docket No. 94]. The Clerk of the Court is directed to enter judgment against Defendants Jacob Family Preservation Trust, a.k.a. Jacob Family Trust and Northern Plains Service.

4. The Government's motion for judgment pursuant to stipulation against Defendant White Rail Company is **GRANTED** [Docket No. 94]. The Clerk of the Court is directed to enter judgment against Defendant White Rail Company.

5. The Boyces' motion for summary judgment and quiet title is **DENIED** [Docket No. 110].

6. The Boyces' motion to strike exhibits K-P of Darmstadter's declaration is **DENIED** [Docket no. 113].

7. The Boyces' motion to strike Julie Piazza's declaration or in the alternative, to reopen discovery is **DENIED** [Docket No. 112].

8. The Boyces' *ex parte* motion to file the Second Declaration of James M. Boyce and Shelley A. Boyce *nunc pro tunc* to September 18, 2000, is **GRANTED** [Docket No. 145].

9. The pretrial conference currently scheduled for **March 19, 2001 at 11:00 a.m.**, shall proceed as to the two remaining parties in this case, Plaintiff United States of America and Defendant State of California.

IT IS SO ORDERED.

Dated: 2/14/01

/s/ M. James Lorenz
M. JAMES LORENZ
UNITED STATES
DISTRICT JUDGE

COPY TO:

HON. LOUISA S. PORTER
UNITED STATES MAGISTRATE JUDGE

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES M. BOYCE, sued individually and as trustee of the Jacob Family Preservation Trust, aka: The Jacob Family Trust and White Rail Company aka: James M. Boyce, et al.,

Defendants-Appellants,

and

THE JACOB FAMILY PRESERVATION TRUST, aka: Jacob Family Trust; WHITE RAIL COMPANY; NORTHERN PLAINS SERVICES; ROB TANNER, as trustee of the Jacob Family Preservation Trust, aka, Jacob Family Trust and The White Rail Company; LAND TITLE INSURANCE COMPANY; FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

Defendants.

No. 01-55410

D.C. No. CV-99-00003-MJL(LSP) Southern District of California, San Diego

ORDER

(Filed Sep. 3, 2002)

Before: KOZINSKI and GOULD, Circuit Judges, and BREYER,* District Judge.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

* The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, VERSUS JAMES M. BOYCE, JR., AKA JAMES M. BOYCE, AND SHELLEY A. BOYCE, ET AL., DEFENDANTS.	) NO. 99CV0003-IEG) HEARING RE:) DISMISSAL FOR WANT OF PROSECUTION PURSUANT TO RULE 4(M) AND MOTION FOR PARTIAL SUMMARY JUDGMENT) SAN DIEGO, CALIFORNIA) FEBRUARY 7, 2000, 11:03 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE IRMA E. GONZALEZ

* * *

[2] SAN DIEGO, CALIFORNIA; MONDAY, FEBRUARY 7, 2000, 11:03 A.M.

THE CLERK: NO. 18 ON CALENDAR, CASE 99CV0003, UNITED STATES OF AMERICA V. JAMES BOYCE FOR A HEARING MOTION FOR A DISMISSAL FOR WANT OF PROSECUTION AND MOTIONS FOR SUMMARY JUDGMENT.

MR. DARMSTADTER: GOOD MORNING, YOUR HONOR. HANK DARMSTADTER ON BEHALF OF THE GOVERNMENT.

MR. SHEPARD: GOOD MORNING, YOUR HONOR. I'M RICHARD SHEPARD. I'M HERE ON BEHALF OF THE BOYCES.

THE COURT: GOOD MORNING. THE FIRST THING I'D LIKE TO TAKE UP IS THE MATTER THAT I PUT ON CALENDAR BEFORE ANY DISMISSAL. AT THIS TIME I'M NOT GOING TO DISMISS AGAINST ANY DEFENDANTS. I THINK THAT AFTER REVIEWING ALL THE PAPERS THAT IT MAY NOT BE IN EVERYONE'S BEST INTEREST. SO THE CASE – I'M JUST GOING TO LET THE CASE PROCEED ON TRACK AS FAR AS – ALL THE PARTIES AND NOT DISMISS PURSUANT TO RULE 4(M). I ASSUME THERE'S NO OBJECTION ON BEHALF OF THE GOVERNMENT.

MR. DARMSTADTER: NO OBJECTION, YOUR HONOR.

THE COURT: OKAY. NOW WE TURN TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT. I KNOW THERE'S BEEN A MOTION ON BEHALF OF THE DEFENDANTS IN THIS CASE, THE BOYCES. THE BOYCES, WHEN I REFER TO THEM AS DEFENDANTS, THAT'S WHO I WILL BE REFERRING TO. I'LL JUST CONTINUE THE HEARING, BUT BEFORE I LOOK AT THAT, I JUST WANT TO MAKE SURE THAT I UNDERSTAND SOME OF THE CONCESSIONS THAT HAVE BEEN MADE WITH REGARD TO THE [3] MOTION FOR PARTIAL SUMMARY JUDGMENT. AND IF I UNDERSTAND THOSE CORRECTLY, THEN MAYBE WE CAN PROCEED.

MR. DARMSTADTER, IS THAT THE WAY YOU PRONOUNCE IT?

MR. DARMSTADTER: YES, MA'AM.

THE COURT: TELL ME WHAT THE GOVERNMENT – WHAT THE GOVERNMENT'S POSITION IS WITH REGARD TO THE – WHAT YOU BELIEVE THE ISSUE IS IN THIS CASE.

MR. DARMSTADTER: YOUR HONOR, WE BROUGHT OUR MOTION FOR PARTIAL SUMMARY JUDGMENT ESSENTIALLY ON TWO ISSUES. THE FIRST WAS THE RES JUDICATA ISSUE WHEREBY WE'RE ARGUING THAT BY REASON OF THE PRIOR TAX COURT DECISION THAT THE TAX LIABILITIES ARE RES JUDICATA AND THAT THEY CANNOT BE REDETERMINED IN THIS PROCEEDING. THE SECOND ALTERNATIVE ARGUMENT IS BASED –

THE COURT: LET ME STOP YOU THERE. THE TAX LIABILITIES BEING THAT THE TAX COURT DECIDED MR. BOYCE OWES THIS MUCH, MS. BOYCE OWES THIS MUCH, AND THE TAX COURT RELIED ON CERTAIN DOCUMENTS IN ARRIVING AT THAT CONCLUSION. THAT'S –

MR. DARMSTADTER: THAT'S RIGHT. IT WAS A MOTION FOR SUMMARY JUDGMENT THAT WAS GRANTED BY THE TAX COURT.

THE COURT: OKAY. SO THAT'S THE FIRST ISSUE. WHAT IS THE SECOND ONE?

MR. DARMSTADTER: AND THE FIRST ISSUE ALSO INCLUDES THE I.R.S. MADE ASSESSMENTS IN CONFORMITY WITH THAT TAX COURT ORDER AND DECISION. AND WE'VE, OF COURSE, ATTACHED THE CONFORMED COPY OF THE TAX COURT'S ORDER AND DECISION, AND ITS [4] OPINION IN THE MOTION FOR SUMMARY JUDGMENT AS WELL AS

THE NINTH CIRCUIT'S AFFIRMATION OF THAT DECISION.

NOW, THE SECOND ISSUE, AND THE ONE THAT I HAVE AGREED TO WITHDRAW FOR – EITHER WITHDRAW OR CONTINUE FOR PURPOSES OF THIS MOTION IS JUST TO RELY ON THE 4340'S. IN OTHER WORDS, ASSUMING THERE WAS NO TAX COURT CASE AND THE GOVERNMENT PRESENTED 4340'S, WE WOULD HAVE A PRESUMPTION OF CORRECTNESS. AND UNLESS THE BOYCES COULD CHALLENGE THAT PRESUMPTION OF CORRECTNESS, IN OTHER WORDS, SHOW WHAT THEIR REAL TAX LIABILITIES WERE –

THE COURT: FOR THE RECORD, WHY DON'T YOU STATE THEM – WHAT THE –

MR. DARMSTADTER: I'M SORRY.

THE COURT: – CORRECT NAME IS OF THE 4340'S.

MR. DARMSTADTER: IT'S A CERTIFICATE OF ASSESSMENTS AND PAYMENTS WHICH THE NINTH CIRCUIT HAS INDICATED CARRIES WITH IT A PRESUMPTIVE EFFECT. IT'S EXEMPT FROM HEARSAY AND IS AN OFFICIAL DOCUMENT UNDER SEAL, AND ITS THE WAY THE GOVERNMENT USES TO ESTABLISH A TAX LIABILITY.

THE COURT: SO YOUR ALTERNATIVE IS THAT – YOU'RE [sic] ALTERNATIVE ARGUMENT IS THAT YOU WOULD AGREE TO RELY ONLY ON THE 4340'S, THAT IS, THE CERTIFICATE OF ASSESSMENT AND PAYMENTS IN ORDER FOR THIS COURT TO

DETERMINE WHETHER RES JUDICATA APPLIES; IS THAT CORRECT?

MR. DARMSTADTER: THAT'S CORRECT, YOUR HONOR. AND [5] THAT'S JUST FOR PURPOSES OF THIS MOTION IN ORDER TO GIVE THE BOYCES ADDITIONAL TIME TO CONDUCT WHAT DISCOVERY THEY WANTED, IF THE COURT DECIDES THAT THE LIABILITIES ARE NOT RES JUDICATA.

THE COURT: OKAY. THAT'S IF THERE IS A DECISION THAT THE LIABILITIES ARE NOT RES JUDICATA.

MR. DARMSTADTER: THAT'S RIGHT.

THE COURT: IF I DECIDE THAT THE LIABILITIES ARE RES JUDICATA, THEN WHAT'S YOUR POSITION? CAN THEY DO ANYTHING ELSE AS FAR AS THIS LAWSUIT IS CONCERNED?

MR. DARMSTADTER: CERTAINLY THERE'S BEEN AN ARGUMENT MADE BY THE BOYCES THAT THEY HAVE MADE PAYMENTS THAT HAVE NOT BEEN REFLECTED –

THE COURT: CORRECT.

MR. SHEPARD: –BY THE I.R.S. AND I THINK IN ALL FAIRNESS THEY OUGHT TO BE GIVEN TIME TO CONDUCT DISCOVERY ON THAT. SO IT WOULD JUST BE AS TO THE AMOUNTS OF THE TAX LIABILITIES, THEN GIVING THE BOYCES AN OPPORTUNITY TO CONDUCT DISCOVERY AND SUBMIT EVIDENCE AS TO LIABILITIES THAT ARE NOT BEING PROPERLY ACCOUNTED FOR BY THE GOVERNMENT. AND I WOULD CERTAINLY COOPERATE

WITH THEM IN THAT EFFORT. BUT AS TO THE AMOUNTS OF THE TAX LIABILITIES IF THEY ARE – IF THE COURT DOES DETERMINE THE TAX COURT DECISION RES JUDICATA, IT WOULD BE OUR DECISION THAT THOSE WOULD BE DETERMINED FOR PURPOSES OF THIS CASE. AND, OF COURSE, THE REASON THAT WE'RE BRINGING THIS MOTION – THIS PARTIAL MOTION FOR SUMMARY JUDGMENT IS TO [6] HOPEFULLY AVOID HAVING TO GO BACK AND RECONSTRUCT THE BOYCES' FINANCIAL ACTIVITIES FOR PERIODS RANGING BACK AS LONG AS 1979.

THE COURT: CORRECT. TELL ME WHY THE GOVERNMENT HAD TO BRING THIS CASE IN THE FIRST PLACE, WHY THE DECISION OF THE TAX COURT AND THE NINTH CIRCUIT WEREN'T JUST DISPOSITIVE OF THE ISSUE OF THE CASE, AND WHY YOU HAD TO COME TO FEDERAL COURT.

MR. DARMSTADTER: CERTAINLY, YOUR HONOR. THIS IS A COLLECTION LAWSUIT PRIMARILY. AND WE ARE SEEKING TO FORECLOSE OUR TAX LIEN UPON PROPERTY UP IN NORTH COUNTY THAT WE BELIEVE IS ACTUALLY OWNED BY THE BOYCES. I DON'T KNOW WHAT THEIR CURRENT POSITION IS ON THAT PROPERTY, BUT IN ORDER TO DO THAT, WE ALSO NEED TO REDUCE THE ASSESSMENTS OF THE JUDGMENT. SO IT HAS TO BE BOTH REDUCING THE ASSESSMENTS TO JUDGMENT AND THEN SEEKING TO FORECLOSE OUR LIEN ON PROPERTY THAT WE BELIEVE IS OWNED BY THE BOYCES. THE I.R.S. DETERMINED THE PROPERTY COULD NOT BE ADMINISTRATIVE SOLD BECAUSE THE TITLE WAS SO CLOUDED, AND SO

WE WERE REQUIRED TO BRING THIS SUIT INTO THE DISTRICT COURT.

THE COURT: I SEE. OKAY. ANYTHING ELSE THAT YOU WANT TO SAY RIGHT NOW AS FAR AS THE CONTINUANCE IS CONCERNED? OR MAYBE YOU WANT TO WAIT TO HEAR WHAT THEY HAVE TO SAY.

MR. DARMSTADTER: CERTAINLY.

THE COURT: OKAY. MR. SHEPARD, WHY DO YOU NEED A CONTINUANCE IN THIS CASE?

MR. SHEPARD: I'M SORRY?

[7] THE COURT: WHY DO YOU NEED A CONTINUANCE OF THE MOTION FOR SUMMARY – PARTIAL SUMMARY JUDGMENT?

MR. SHEPARD: WELL, ON THE BASIS OF WHAT MR. DARMSTADTER SAID, I'M NOT ENTIRELY CLEAR WHETHER WE DO.

THE COURT: LET'S ASSUME THAT I DECIDE THAT THE ACTUAL JUDGMENT OF THE TAX COURT IS RES JUDICATA, THAT YOU ARE BOUND BY IT, YOUR CLIENTS ARE BOUND BY IT, THE GOVERNMENT IS BOUND BY IT.

MR. SHEPARD: RIGHT.

THE COURT: BUT I WOULD ALLOW THE BOYCES TO SUBMIT EVIDENCE REGARDING PAYMENTS OR CREDITS THAT HAVE NOT BEEN CALCULATED BY – OR AT LEAST ADDRESSED BY THE GOVERNMENT IN THE ASSESSMENTS THAT THEY'VE DETERMINED. THAT'S BASICALLY WHAT I

UNDERSTAND YOUR CLIENTS WANT TO DO IN THIS CASE.

MR. SHEPARD: WELL, NOT ENTIRELY. WE'RE ALSO – WE'RE NOT WILLING TO CONCEDE THAT THE AMOUNTS THAT WERE DETERMINED BY THE TAX COURT ARE CORRECT.

THE COURT: RIGHT.

MR. SHEPARD: IT'S JUST A MATTER OF MATHEMATICS AND AS TO THE ADDITIONS AS TO WHETHER OR NOT THEY ARE JUSTIFIED.

THE COURT: I'M SORRY. GO OVER THAT AGAIN.

MR. SHEPARD: I SAY BOTH AS TO THE MATHEMATICS OF THE CALCULATIONS AND AS TO THE ADDITIONS WHETHER OR NOT THEY ARE JUSTIFIED.

THE COURT: BUT DIDN'T YOUR CLIENTS HAVE THE [8] OPPORTUNITY TO ATTACK THE GOVERNMENT'S EVIDENCE DURING ALL THE PROCEEDINGS THAT TOOK PLACE IN THE TAX COURT AND IN THE COURT OF APPEALS?

MR. SHEPARD: THAT DEPENDS ON HOW YOU LOOK AT IT. I SUPPOSE IN A GROSS SENSE, THEY DID. BUT THEIR POSITION WAS IN THE TAX COURT THAT THE TAX AS CURRENTLY LAID FORTH IN THE STATUTE DIDN'T APPLY TO THEM; THAT IT WOULD HAVE TO BE SUBJECT TO AN APPORTIONMENT RULE. NOW, WHETHER THAT'S LEGITIMATE OR PRIVILEGED OR WHATEVER, IS REALLY NOT THAT RELEVANT EXCEPT TO THE EXTENT THAT

THEY WERE NEVER – THEY NEVER EVEN CONCEDED THE FACT OF THE LIABILITY. AND IN THE COURSE OF THE DISCOVERY, THEY WERE ASKED TO ADMIT THAT LIABILITY. AND IF THEY – IT DIDN'T MATTER WHICH WAY THEY ANSWERED IT. EITHER WAY, THE BURDEN BECAUSE OF THE WAY ADMISSIONS WORK, THE BURDEN SHIFTED TO THEM TO PROVE THEIR DENIAL. BUT THE BURDEN AS TO THE TAX LAW, PARTICULARLY AS IT RELATES TO THE FRAUD, IS ON THE GOVERNMENT. SO BY BEING FORCED TO ANSWER ADMISSIONS, THE BURDEN OF PROOF SHIFTED.

THE COURT: AND SO WHAT DO YOUR CLIENTS WANT IN THIS CASE? WHAT DO THEY WANT TO BE ABLE TO DO?

MR. SHEPARD: WHAT MY CLIENTS WANT TO DO IS A FAIR CALCULATION OR STIPULATION OF THE AMOUNT OF TAX DUE AND A DETERMINATION FINALLY AND ULTIMATELY AS TO WHETHER OR NOT THE ADDITIONS, THE FRAUDS, AND THE PENALTIES, AND THE INTEREST ARE LEGITIMATE CREDIT FOR THE FULL AMOUNT THAT WAS TAKEN PURSUANT [9] TO THE JEOPARDY ASSESSMENT, AND THEN PAYMENT ARRANGEMENTS ON THE BALANCE. DEPENDING ON WHAT THE NUMBERS COME OUT, IT MAY MEAN THAT THEY MAY HAVE TO SURRENDER SOME PROPERTY OR SOMETHING. BUT RATHER THAN GO THROUGH THIS ON A NUMBER OF LEGAL TECHNICALITIES, WHICH IS ESSENTIALLY WHAT RES JUDICATA IS ABOUT, IT HAS PUBLIC POLICY PURPOSES AND THAT SORT OF THING, BUT IT'S NOT REALLY A DETERMINATION ON THE MERITS.

THE COURT: BUT IT'S ME GIVING EFFECT TO A PRIOR JUDGMENT WHEN YOUR CLIENTS HAD THE OPPORTUNITY TO APPEAR AND DEFEND THEMSELVES IN THAT PROCEEDING AND COULD HAVE RAISED ALL THESE ISSUES. AND THERE IS A VERY IMPORTANT POLICY REASON BEHIND RES JUDICATA, BECAUSE IT INVOLVES THE SAME PARTIES. IT INVOLVES THE SAME ISSUES THAT ARE NOW BEFORE THIS COURT. AND SO THERE HAS TO BE A REASON WHY I SHOULDN'T GIVE RES JUDICATA EFFECT TO THAT JUDGMENT WHEN THEY WERE GIVEN EVERY OPPORTUNITY.

I UNDERSTAND ABOUT THE ADMISSIONS, BUT THEY DECLINED TO DO ANYTHING ABOUT THE CALCULATIONS AT THAT TIME, BECAUSE THEIR POSITION WAS DIFFERENT THAN IT IS NOW. I UNDERSTAND THAT.

MR. SHEPARD: RIGHT.

THE COURT: BUT THE FACT REMAINS THAT THEY STILL HAD THAT OPPORTUNITY AT THE TIME, AND THEY'RE THE SAME PARTIES THAT ARE ADJUDICATED LIABLE.

MR. SHEPARD: WELL, THAT DEPENDS ON WHAT THE COURT [10] DETERMINES IS THE CLAIM TO BE PRECLUDED. IF YOU LOOK AT THE TAX COURT DECISION, IT IS BASED ON THE NOTICES OF DEFICIENCY WHICH WERE MAILED OUT IN THIS CASE IN MARCH 17TH, 1989.

WHAT MR. DARMSTADTER IS SEEKING RES JUDICATA ON ARE ASSESSMENTS THAT OCCURRED

BOTH BEFORE AND AFTER THAT TIME. SO, IN FACT, THE CLAIM IS DIFFERENT.

I THINK, YOUR HONOR, THAT THE *CASSIDY* COURT HAD TO STRUGGLE WITH WHAT YOUR HONOR IS HAVING HERE, BUT I THINK ULTIMATELY THEY CAME DOWN ON THE SIDE OF PUBLIC POLICY. IF YOU LOOK AT THE FOOTNOTE – THERE'S A VERY LONG FOOTNOTE DISCUSSING THIS ISSUE.

THE COURT: NOW, WE'RE TALKING ABOUT THE MERITS OF THE RES JUDICATA MOTION.

MR. SHEPARD: YES.

THE COURT: I GUESS YOU WANT ME TO GO FORWARD ON IT BECAUSE YOU DON'T BELIEVE YOU NECESSARILY NEED A CONTINUANCE TO CONDUCT DISCOVERY AT THIS TIME REGARDING THIS ISSUE.

MR. SHEPARD: WELL, ONE RESERVATION THAT I HAVE. AND I WANT TO BE VERY CLEAR ABOUT THIS. MY AGREEMENT WITH MR. DARMSTADTER WAS THAT WE WOULD BE LOOKING AT THE IMPACT OF THE TAX COURT DECISION EXCLUSIVELY AND THAT THE 4340 CERTIFICATE OF ASSESSMENTS AND PAYMENTS WOULD BE RESERVED TO A LATER DATE. BUT WHAT I'M HEARING TODAY IS THAT HE STILL NEEDS IT TO MAKE SOME PROOF OF THE ASSESSMENTS, WHICH FURTHER GOES TO MY POINT.

[11] THE COURT: HE STILL NEEDS WHAT? I'M SORRY.

MR. SHEPARD: AS I UNDERSTAND – WHAT I'M HEARING HIM SAY IS THAT HE NEEDS THE 4340'S TO PROVE THE EXISTENCE OF THE ASSESSMENTS THAT HE WANTS RES JUDICATA ON. AND I THINK THAT'S TRUE, BECAUSE IF YOU WILL RECALL, I JUST SAID THE TAX COURT DECISION IS BASED ON THE DEFICIENCIES. AND AN ASSESSMENT AND DEFICIENCY ARE TWO DIFFERENT PROCESSES OR TWO DIFFERENT STEPS IN THE SAME PROCESS, BUT THEY ARE DIFFERENT CLAIMS.

THE COURT: YOUR POSITION IS THAT THE TAX COURT'S DECISION IS BASED ON THE DEFICIENCIES.

MR. SHEPARD: YEAH.

THE COURT: AND SO YOU NEED A CONTINUANCE TO DO WHAT?

MR. SHEPARD: IT DEPENDS ON WHETHER OR NOT MR. DARMSTADTER NEEDS HIS 4340'S OR NOT. IF HE DOES, THEN I NEED A CONTINUANCE.

THE COURT: OKAY. AND IF HE DOES NOT?

MR. SHEPARD: THEN WE CAN GO FORWARD AND ARGUE WHETHER OR NOT THE TAX COURT DECISION HAS ANY PRECLUSIVE EFFECT.

THE COURT: OKAY. LET ME JUST GET SOMETHING CLEAR FROM MR. DARMSTADTER. WHAT IS YOUR POSITION? SEE, YOUR POSITION IS IN THE ALTERNATIVE. AND SO DO YOU NEED THE 4340'S IN ORDER FOR ME TO DETERMINE WHETHER

RES JUDICATA APPLIES IN THIS CASE? I MEAN, ARE YOU RELYING ON THEM? I ASSUME YOU ARE.

MR. DARMSTADTER: LEGALLY WE DON'T NEED THE 4340'S FOR THE COURT TO DETERMINE RES JUDICATA. HOWEVER, THE REASON THAT [12] I AM RELYING ON THEM IN THAT PORTION OF THE MOTION IS SO THAT THE COURT CAN DETERMINE THAT THE AMOUNT OF TAX LIABILITY THAT WAS DETERMINED BY THE TAX COURT WAS ASSESSED AND REFLECTED IN THOSE 4340'S. AND I WENT THROUGH PAINSTAKINGLY AND ADDED UP ALL THE AMOUNTS AND CONFIRMED THEM TO THE 4340'S. AND THE COURT CAN GO THROUGH THE SAME PROCESS TO DETERMINE THAT WE COMPLIED WITH WHAT THE TAX COURT INSTRUCTED US TO DO, WHICH WAS TO ASSESS THESE LIABILITIES.

THE COURT: SO THE TAX COURT DID RELY ON THE 4340'S.

MR. DARMSTADTER: THE 4340'S WERE CREATED AFTER THE FACT. THEY WERE – THEY'RE SIMPLY A RECORD OF WHAT THE I.R.S. COMPUTER SHOWS. THE I.R.S. WENT AHEAD AND MADE THE ASSESSMENTS THAT THE TAX COURT INSTRUCTED THEM TO MAKE BASED ON ITS DETERMINATIONS.

THE COURT: AND THEY WERE CREATED AFTER THE TAX COURT DECISION.

MR. DARMSTADTER: AFTER THE TAX COURT'S DECISION. WHEN A TAXPAYER RECEIVES NOTICE OF DEFICIENCY, THEY HAVE A CHOICE. THEY CAN EITHER IMMEDIATELY FILE A PETITION

WITH THE TAX COURT OR, OF COURSE, GO TO THE DISTRICT COURT IN A REFUND SUIT. IN THIS CASE THE BOYCES CHOSE TO GO TO TAX COURT. AT THIS POINT IN TIME THE I.R.S. IS PRECLUDED FROM MAKING THE ASSESSMENTS EXCEPT AS IT PERTAINS TO THE JEOPARDY ASSESSMENTS THAT WERE MADE IN THIS CASE. ONCE THE TAX COURT CASE IS CONCLUDED, THE I.R.S. IS INSTRUCTED BY THE TAX COURT TO MAKE [13] ASSESSMENTS IN CONFORMITY WITH THE TAX COURT'S DECISION.

SO ALL I'M USING THE 4340'S FOR, FOR PURPOSES OF THE THIS LIMITED MOTION, IS TO ESTABLISH THAT THE I.R.S. MADE ASSESSMENTS IN CONFORMITY WITH THE TAX COURT'S DECISION, NOT THAT THOSE ASSESSMENTS ACCURATELY REFLECT THE BOYCES' CORRECT TAX LIABILITY ABSENT THE RES JUDICATA EFFECT.

THE COURT: I SEE. AND THEN YOU ARE WILLING TO GO FORWARD ON THE CORRECTNESS OF THE 4340'S, ASSUMING THAT THERE'S MORE EVIDENCE THAT THE BOYCES CAN PRESENT.

MR. DARMSTADTER: CERTAINLY WITH RESPECT TO PAYMENTS THAT THEY MADE THAT ARE NOT REFLECTED, I THINK THEY SHOULD HAVE AN OPPORTUNITY TO GO FORWARD ON THAT.

THE COURT: OKAY. ANYTHING ELSE, MR. SHEPARD? I'M FAMILIAR WITH *CASSIDY*. I KNOW THAT YOU WERE TALKING ABOUT THE FOOTNOTE. WHAT WERE YOU GOING TO SAY ABOUT THAT?

MR. SHEPARD: WELL, I NEED TO BE REAL CLEAR HERE. WE'RE NOT WILLING TO JUST GO INTO DISCOVERY AS TO WHAT PAYMENTS MIGHT HAVE BEEN MADE. WE ARE DISPUTING THE AMOUNTS OF THAT THIRD 4340, BOTH IN TERMS OF THE ASSESSMENT AND THE PENALTIES. THIS IS NOT A LIMITED DISCOVERY SITUATION HERE. THOSE 4340'S ARE WRONG. AND IF YOU LOOK AT THE 1991 4340 THAT WE PUT IN THAT WAS PROVIDED TO US THROUGH DISCOVERY, IT'S OBVIOUS THAT THERE ARE SOME DISPARITIES HERE. EITHER THE TAX COURT'S WRONG OR ONE 4340 IS WRONG OR THE OTHER ONE IS WRONG.

THE COURT: OKAY.

[14] MR. SHEPARD: AND THERE'S GOT TO BE SOME DISCOVERY ON THAT OR ELSE THE DECISION, WHATEVER IT IS, IS GOING TO BE BASED ON A PRESUMPTION.

THE COURT: AND WHAT DO YOU PROPOSE TO DISCOVER? IN OTHER WORDS, GIVE ME A PLAN OF WHAT YOU WOULD DO IN ORDER TO CONDUCT YOUR DISCOVERY?

MR. SHEPARD: WELL, THE FIRST THING I NEED TO DO IS TO TALK TO THE PEOPLE THAT CONDUCTED THE JEOPARDY ASSESSMENT AND FIND OUT WHERE THEY SENT OUT LEVIES AND WHAT THE PROCEEDS WERE. NOW, IT MAY BE THAT THERE'S SOME MORE FILES SOMEWHERE. YOU KNOW, ONE OF THE THINGS THAT I POINTED OUT IN MY RESPONSIVE PAPERWORK IS THAT IT'S OBVIOUS FROM THE DISCOVERY THAT'S BEEN PROVIDED THAT THERE MUST BE SOME MORE

PAPERWORK SOMEWHERE THAT WE DIDN'T GET THAT WOULD BE RELEVANT JUST TO THE ISSUE OF PAYMENTS.

NOW, I WANT TO SAY ONE OTHER THING, TOO. WE'RE REALLY CONCERNED ABOUT THE PENALTIES AND INTEREST MORE THAN WE ARE ABOUT THE UNDERLYING TAX. I MEAN, WE UNDERSTAND WHAT MR. DARMSTADTER'S CONCERN IS BECAUSE WE HAVE IT TOO. WE'VE GOT 800 – 700 OR 800 DOCUMENTS FROM 5, 6, 10 YEARS – 20 YEARS AGO. WE'RE GOING TO HAVE TO GO BACK AND FIND A COPY OF THE TAX CODE FROM THOSE YEARS TO FIGURE OUT WHAT THE TRUE TAX IS. SO IT MAY BE THAT SOMEWHERE ALONG THE LINE – YOU KNOW, WE'VE GOT A SETTLEMENT CONFERENCE TOMORROW. MAYBE MR. DARMSTADTER AND I COULD COME TO SOME SORT OF AGREEMENT AS TO WHAT THE UNDERLYING [15] TAX IS, AND THEN WE CAN JUST ARGUE WHETHER OR NOT THE PENALTIES APPLY.

THE COURT: WHO'S YOUR MAGISTRATE JUDGE?

MR. SHEPARD: PORTER.

THE COURT: IT MAY BE THAT YOU'LL WANT TO CONTINUE THAT. I'M GOING TO DO A WRITTEN ORDER IN THIS CASE. AND I DON'T KNOW IF YOU WOULD ACCOMPLISH MUCH BY GOING TO A SETTLEMENT CONFERENCE TOMORROW WITHOUT KNOWING WHAT MY ORDER IS GOING TO BE WITH REGARD TO THIS ISSUE. NOW, YOU ARE WELCOME TO GO AND SEE HER, BUT I THINK YOU ARE GOING TO NEED THE BENEFIT OF WHAT I'M GOING TO DO

IN THIS CASE IN ORDER TO DECIDE WHAT, IF ANY, DISCOVERY IS GOING TO BE CONDUCTED AND THEN TAILOR IT TO MY ORDER.

MR. SHEPARD: NO, I UNDERSTAND THAT. I THINK THAT WHAT MAGISTRATE PORTER WAS THINKING WAS THAT SINCE MR. DARMSTADTER IS FROM D.C. AND I'M FROM WASHINGTON STATE, IF WE'RE HERE ANYWAY, WE MIGHT WANT TO SEE IF WE CAN DO SOMETHING.

THE COURT: ABSOLUTELY. IT MAY BE THAT YOU CAN FLESH OUT SOME THINGS TOO AT THAT TIME.

MR. SHEPARD: YEAH.

THE COURT: LET ME ASK MR. DARMSTADTER SOME QUESTIONS. I HAVE ANOTHER CALENDAR IN A FEW MINUTES.

MR. DARMSTADTER, WHAT'S THE RELATIONSHIP BETWEEN THE JEOPARDY ASSESSMENTS AND THE STATUTORY NOTICES OF DEFICIENCIES? THEY'RE NOT ONE IN THE SAME.

[16] MR. DARMSTADTER: NO, THEY'RE NOT ONE IN THE SAME. THE JEOPARDY ASSESSMENTS IS A – IT'S A PROCEDURE THAT THE I.R.S. USES WHEN THEY CAN'T WAIT UNTIL A TAX COURT CASE HAS BEEN DECIDED BECAUSE THEY FEEL THAT A TAXPAYER IS MOVING PROPERTY AROUND. SO ONCE THE – ONCE THE TAXES ARE DETERMINED, THERE WILL BE NO ASSETS FROM WHICH TO COLLECT THE LIABILITY.

A TAXPAYER IS ENTITLED TO CHALLENGE THE JEOPARDY ASSESSMENT, BUT IT'S BY A SEPARATE PROCEDURAL ROUTE. AND THE BOYCES CHOSE NOT TO CHALLENGE THOSE JEOPARDY ASSESSMENTS. AND THAT WAS MANY YEARS AGO. THAT WAS 1989, I BELIEVE, WHEN THEY WERE MADE, SO THEY ARE NOW PREVENTED FROM CHALLENGING THE JEOPARDY ASPECT OF IT.

THE COURT: BUT ONCE THE NOTICES OF DEFICIENCY ARE ISSUED, DOES THAT KIND OF TAKE CARE OF THE JEOPARDY ASSESSMENTS? ARE THE JEOPARDY ASSESSMENTS – DO THEY HAVE ANY LEGAL EFFECT AFTER THE NOTICES OF DEFICIENCY ARE ISSUED?

MR. DARMSTADTER: THEY DO, YOUR HONOR. THEY PERMIT THE I.R.S. TO COLLECT DURING THE PENDENCY OF THE TAX COURT CASE.

THE COURT: BUT THE TAX COURT IS OVER.

MR. DARMSTADTER: RIGHT. THE TAX COURT CASE IS OVER NOW, SO THEY BECOME REGULAR ASSESSMENTS, AND WE CAN COLLECT THEM ADMINISTRATIVELY OR JUDICIALLY, AS WE HAVE CHOSEN TO DO WITH THIS SUIT BECAUSE OF THE PROBLEMS WITH TITLE AND THE PROPERTY.

[17] THE COURT: THEN WHY DO YOU NEED THE NOTICES OF DEFICIENCY?

MR. DARMSTADTER: THE NOTICES OF DEFICIENCY WERE THE ONLY WAY BY WHICH THE BOYCES WOULD BE GIVEN AN OPPORTUNITY T6O GO TO TAX COURT. THEY ARE THE STATUTORY

PREREQUISITE FOR A TAXPAYER TO BE ABLE TO FILE A PETITION IN TAX COURT. THEY'RE TYPICALLY REFERRED TO AS THE TICKET TO THE TAX COURT, AND THE BOYCES EXERCISED THAT TICKET.

THE COURT: AND THEN THEY WENT TO TAX COURT, I ASSUME, BASED ON THE NOTICES OF DEFICIENCY.

MR. DARMSTADTER: YES, MA'AM. THE TAX COURT THEN HAD JURISDICTION TO DETERMINE THOSE LIABILITIES, AND DID SO.

THE COURT: IF I DETERMINE THAT RES JUDICATA APPLIES IN THIS CASE, IS IT THE GOVERNMENT'S POSITION THAT THE BOYCES CANNOT CHALLENGE THE STATUTORY NOTICES OF DEFICIENCY?

MR. DARMSTADTER: THAT'S CORRECT, YOUR HONOR. THEY COULDN'T CHALLENGE THEM ANYWAY. ALL THEY COULD DO IN THIS CASE WOULD BE TO COME FORWARD WITH EVIDENCE, ASSUMING THAT IT WAS NOT RES JUDICATA, AND SAY THIS IS WHAT OUR TRUE AND CORRECT TAX LIABILITY IS.

THE COURT: NO, LET'S ASSUME RES JUDICATA. THERE'S MY QUESTION.

MR. SHEPARD: THAT RES JUDICATA DOES APPLY?

THE COURT: IT DOES APPLY.

MR. DARMSTADTER: THEN THOSE LIABILITIES ARE FIXED BY [18] REASON OF THE PRIOR TAX COURT DECISION. IN OTHER WORDS, THEY WOULD OWE THE – FOR ANY PARTICULAR YEAR THAT WAS INVOLVED IN THE TAX COURT CASE, THE AMOUNT THAT WAS DETERMINED BY THE TAX COURT PLUS PENALTIES.

THE COURT: SO THEY COULD NOT CHALLENGE THE STATUTORY NOTICES OF DEFICIENCY, CORRECT?

MR. DARMSTADTER: THAT'S CORRECT.

THE COURT: NOW, DIDN'T THE BOYCES APPEAL THE JEOPARDY ASSESSMENT?

MR. DARMSTADTER: THEY APPEALED THE TAX COURT'S DECISION TO THE NINTH CIRCUIT. AND WE'VE ATTACHED A COPY WITH THE NINTH CIRCUIT'S DECISION. IN FACT, I WAS JUST ABOUT TO READ FROM THAT DECISION. IT'S ATTACHED AS EXHIBIT "Q." IT'S A NON-PUBLISHED DECISION, BUT, OF COURSE, IT'S BEING CITED FOR ITS RES JUDICATA EFFECT.

THE COURT: RIGHT.

MR. DARMSTADTER: AND IT WAS – IT'S EXHIBIT "Q."

THE COURT: I HAVE IT. IT'S A VERY SHORT ORDER – FAIRLY SHORT. WHAT'S YOUR POINT?

MR. DARMSTADTER: WELL, YOUR HONOR, WHAT I WAS GOING TO READ FROM IS JUST TO

KIND OF CLARIFY THAT THE BOYCES DID GET EVERY OPPORTUNITY IN THE TAX COURT.

THE COURT: I UNDERSTAND THAT'S YOUR ARGUMENT. YOU DON'T HAVE TO READ FROM THE DECISION.

NOW, LET'S TALK ABOUT ONE LAST THING. THE FINES AND [19] THE PENALTIES. OBVIOUSLY THAT'S A REAL CONCERN OF THE BOYCES. LET'S ASSUME I DECIDE THAT THERE'S RES JUDICATA. DOES MY JUDGMENT ON THAT THEN TAKE CARE OF THE PENALTIES AND INTEREST THAT THE I.R.S. HAS ASSESSED?

MR. DARMSTADTER: WHAT WE'RE SEEKING IS FOR THE COURT TO ADJUDICATE THAT THE TAX LIABILITIES WERE RES JUDICATA; THAT THE PENALTIES AS DECIDED BY THE TAX COURT ARE RES JUDICATA, AND THEN INTEREST FLOWS FROM THAT SIMPLY AS A MATTER OF LAW. THAT'S SOMETHING THAT'S IMPOSED DIRECTLY BY THE INTERNAL REVENUE CODE

THE COURT: THEN WHAT ARE YOU SAYING THE BOYCES WOULD BE ABLE TO DISCOVER?

MR. DARMSTADTER: PAYMENTS.

THE COURT: PAYMENTS THAT THEY MAY HAVE MADE –

MR. DARMSTADTER: PAYMENTS THAT THEY WOULD HAVE MADE AS TO THE LIABILITIES. THEY HAVE SAID THAT THERE WERE MONIES THAT THEY SUBMITTED THAT WE DID NOT GIVE THEM PROPER CREDIT FOR AND THAT AREN'T

REFLECTED ON THE TRANSCRIPTS AND THAT HAVEN'T BEEN REFLECTED IN OTHER I.R.S. ACCOUNTS. AND TO THE EXTENT THAT THEY WANT TO DO DISCOVERY ON THAT OR THEY WANT TO PRODUCE EVIDENCE THAT THEY HAVE MADE PAYMENTS, I WILL CERTAINLY COOPERATE ON THAT.

THE COURT: ANY LAST STATEMENT ABOUT *CASSIDY*?

MR. DARMSTADTER: WELL, YOUR HONOR. I BRIEFED THAT IN MY REPLY BRIEF, WHICH I HOPE THE COURT HAS RECEIVED AND HAD AN [20] OPPORTUNITY TO TAKE A LOOK AT. WE'RE ESSENTIALLY TAKING THE POSITION THAT *CASSIDY* IS SIMPLY DIRECTED TO THE COLLATERAL ESTOPPEL EFFECT AND NOT RES JUDICATA.

THE COURT: RIGHT.

MR. DARMSTADTER: I WAS UNABLE TO FIND A CASE ON POINT EITHER INVOLVING TAX COURT RULE 90 OR FEDERAL RULE OF CIVIL 36(B), WHICH IS ALMOST IDENTICAL TO RULE 90(F).

THE COURT: AND SO THAT'S WHAT YOU ARE SAYING DISTINGUISHES *CASSIDY* FROM THIS CASE.

MR. DARMSTADTER: THAT'S CORRECT. AND ALTHOUGH WE COULD NOT FIND ANY CASES, THERE ARE MANY CASES THAT HOLD THAT IN CASES WHERE THE TAX COURT REACHED ITS DECISION BY WAY OF SETTLEMENT OR BY WAY OF A DEFAULT BY ONE OF THE PARTIES, THAT IT WAS HELD IN THE SUBSEQUENT DISTRICT COURT

COLLECTION SUIT TO HAVE RES JUDICATA EFFECT. AND THAT, OF COURSE, WOULD NOT BE THE CASE WITH COLLATERAL ESTOPPEL, BECAUSE OF THE ACTUALLY LITIGATED REQUIREMENT. AND I BELIEVE IT'S EVIDENCE FROM A CAREFUL READING OF THAT LONG FOOTNOTE IN *CASSIDY* THAT THE COURT IS REALLY TALKING ABOUT THE COLLATERAL ESTOPPEL EFFECT AND NOT RES JUDICATA, BECAUSE THE SUBSEQUENT ACTIONS DID NOT INVOLVE THE SAME ISSUE. ONE WAS TO DETERMINE TAX LIABILITY; THE OTHER ONE WAS TO DETERMINE DISCHARGEABILITY OF THOSE TAXES IN A BANKRUPTCY COURT. AND IT WAS THE CONCLUSION OF THE SEVENTH CIRCUIT THAT THEY WERE TWO DIFFERENT CLAIMS. SO RES JUDICATA WOULD NOT APPLY IN THAT INSTANCE.

[21] THE COURT: SO ARE YOU SAYING THAT THE POLICY REASONS BEHIND RULE 90 ARE NOT UNDERMINED IF I – LET'S SAY, I APPLY IT AS TO COLLATERAL ESTOPPEL BUT NOT AS TO RES JUDICATA? I MEAN, THERE IS A POLICY REASON BEHIND THIS RULE AND THAT IS THAT CASES SHOULDN'T BE DECIDED ON THE FAILURE OF THE PARTIES TO ADMIT CERTAIN THINGS.

MR. DARMSTADTER: BUT I'M SAYING RES JUDICATA HAS A DIFFERENT PUBLIC POLICY WHICH IS THAT AN ISSUE OR A CLAIM ONCE LITIGATED HAS BEEN DECIDED FOR ALL TIMES – WHETHER IT'S BY A DEFAULT, WHETHER IT'S BY REASON OF SETTLEMENT, OR WHETHER IT'S BY A DECISION, YOU KNOW, A FULL-BLOWN EVIDENTIARY TRIAL; WHEREAS COLLATERAL ESTOPPEL DETERMINES SPECIFIC FACTS THAT CAN LATER BE

USED IN OTHER PROCEEDINGS. AND IT'S UNFAIR TO HAVE – BECAUSE, FOR EXAMPLE, THE ISSUES MAY NOT HAVE THE SAME WEIGHT IN TWO DIFFERENT CASES. YOU KNOW, ONE MAY BE A MINOR AMOUNT OF MONEY INVOLVED AND ANOTHER MAY BE A MUCH LARGER AMOUNT OF MONEY INVOLVED, SO THE PARTY DEFAULTED IN ONE. IT'S UNFAIR TO HAVE THAT USED AGAINST HIM FOR COLLATERAL ESTOPPEL PURPOSES IN THE SUBSEQUENT ACTION.

THE COURT: THANK YOU. ANY LAST COMMENTS, MR. SHEPARD?

MR. SHEPARD: YOUR HONOR, I REALLY DON'T FEEL LIKE I'VE HAD A CHANCE TO ADDRESS THE RES JUDICATA ISSUE. I'VE BEEN SPEAKING AT LEAST IN MY MIND MOSTLY IN TERMS OF –

THE COURT: WELL, YOU HAVE FIVE MINUTES.

[22] MR. SHEPARD: ALL RIGHT. WELL –

THE COURT: I'VE READ ALL THE PAPERS. YOU ARE NOT EVEN ENTITLED TO ORAL ARGUMENT IN THIS CASE. AND I'VE PUT THIS ON CALENDAR BECAUSE I WANTED TO BASICALLY DECIDE THE MATTER OF CONTINUANCE, BUT I'LL LET YOU ARGUE FOR THE NEXT FIVE MINUTES, IF YOU WISH.

MR. SHEPARD: ALL RIGHT. WELL, THE FIRST THING I WANT TO POINT OUT IS THAT RES JUDICATA – ONE OF THE PRIMARY PUBLIC POLICY PURPOSES FOR RES JUDICATA IS TO PROTECT A DEFENDANT FROM REPEATED CLAIMS BY THE

SAME PLAINTIFF. WE DON'T HAVE THAT HERE. HERE WHAT WE HAVE IS THE DEFENDANT IN A PRIOR CASE NOW THE PLAINTIFF USING IT AS A WEAPON AGAINST THE NOW DEFENDANT. THAT ITSELF UNDERMINES THE RES JUDICATA PURPOSE BECAUSE IT AVOIDS ANY KIND OF FAIR RESOLUTION OF THE MERITS.

WE HAVE THREE ARGUMENTS AGAINST APPLICATION OF RES JUDICATA. THE FIRST IS WAIVER; THE SECOND IS THAT THE JUDGMENT IS BASED ON DECISIONS, AS WE'VE BEEN TALKING A LITTLE BIT ABOUT *CASSIDY*; AND THIRD, THAT THE JUDGMENT IS INVALID AND THAT IT FAILED TO TAKE THE JEOPARDY ASSESSMENT PROCEEDS INTO ACCOUNT. I'VE ALREADY TALKED ABOUT THOSE IN MY PLEADINGS, BUT I WANT TO RESPOND TO SOME OF THE THINGS THAT MR. DARMSTADTER SAID IN HIS REPLY.

THE FIRST THING I'M GOING TO SAY IS THAT THE WAIVER ISSUE IS VALID. HE KIND OF MADE LIGHT OF IT BY STICKING IT IN A FOOTNOTE IN HIS REPLY, BUT HE'S RELYING PRIMARILY ON *MOORE*, [23] WHICH IS PERSUASIVE AT BEST.

AND IF YOU LOOK AT *JACKSON V. HYACOWL* (PHONETIC), WHICH IS ONE OF THE NINTH CIRCUIT CASES WHICH CITED IN THAT SECTION OF *MOORE* – AND I GAVE A COPY TO THE CLERK, BY THE WAY – YOU FIND THAT WHAT HAPPENED THERE WAS THE PLAINTIFF DID NOT FIRST RAISE THE RES JUDICATA ISSUE. IT WAS WHEN THE DEFENDANT RAISED THE RES JUDICATA ISSUE AND PREVAILED ON A RES JUDICATA MOTION

THAT THE PLAINTIFF CLAIMED THE RIGHT TO THE BENEFITS TO CALL AS WELL AS THE BURDENS OF THE RES JUDICATA, BECAUSE THE PRIOR CASE DID, IN FACT, RULE IN FAVOR OF THE – IT WAS COLLEGE STUDENTS AGAINST THE COLLEGE – IN FAVOR OF THE COLLEGE IN THE PRIOR CASE. AND EVEN THERE, THE PLAINTIFFS ARGUE THAT IF THEY WERE – OR CONCEDED THAT THEY WOULD HAVE TO HAVE AMENDED THEIR PLEADINGS UNDER 15(B) IN ORDER TO GET RES JUDICATA BENEFITS. THE GOVERNMENT DIDN'T DO THAT HERE.

I THINK I'VE PRETTY MUCH COVERED THE *CASSIDY* ISSUE, EXCEPT TO POINT OUT THAT ALL OF THE CASES THAT THE GOVERNMENT CITES WHERE THE PLAINTIFF MADE AND THEN ABANDONED OR SETTLED THE CLAIM AREN'T ON POINT, BECAUSE WE'RE TALKING ABOUT A CASE NOW WHERE THE DEFENDANT IS COMING BACK AND USING THE DECISION.

THE COURT: DIDN'T THE SEVENTH CIRCUIT DISTINGUISH BETWEEN COLLATERAL ESTOPPEL AND RES JUDICATA IN *CASSIDY*?

MR. SHEPARD: I DON'T BELIEVE THAT'S TRUE. I THINK IF YOU LOOK AT THE FOOTNOTE, IT'S PRECLUSIVE AS TO WHETHER IT'S IN A CLAIM OR AN ISSUE. I MEAN, IT SAYS "FACT," WHICH YOU WOULD [24] THINK MEANS ISSUED, BUT FACTS SUPPORT CLAIMS AS WELL AS THEY SUPPORT ISSUES.

AND BESIDES THAT, AS I POINTED OUT EARLIER, THE TAX COURT CASE WAS GENERATED AND

ENGENDERED AND LITIGATED OVER THE LEGITIMACY OF DEFICIENCY NOTICE AND NOT AN ASSESSMENT. IN FACT, THERE'S SOME ASSESSMENTS IN THE 4340 THAT WEREN'T EVEN BEFORE THE TAX COURT. THEY'RE COMPLETELY DIFFERENT CAUSES OF ACTION. SO EVEN IF IT IS CLAIMED PRECLUSION AS OPPOSED TO COLLATERAL ESTOPPEL, WE HAVE DIFFERENT CLAIMS HERE.

THE OTHER POINT I WANTED TO MAKE WAS THAT EVEN IF YOU LOOK AT THE GOVERNMENT'S DOCUMENTS – OFFER OF PROOF AS TO UNDISPUTED FACTS, YOU REALIZE THAT THERE'S A PROBLEM WITH THE TAX COURT DECISION ON ITS FACE BECAUSE THEY DIDN'T TAKE INTO ACCOUNT THE JEOPARDY ASSESSMENTS. THEY HAVE A STATUTORY OBLIGATION UNDER 6861 TO REPORT TO THE TAX COURT WHAT THEY'RE DOING ON THE JEOPARDY ASSESSMENT, AND THEY DIDN'T DO THAT HERE. THE TAX COURT DOESN'T REFLECT ANY OF THAT.

AND SO WE HAVE $35,000, BY THE GOVERNMENT'S OWN ADMISSION, PAID IN WHILE THE TAX COURT IS PENDING, AND THE TAX COURT DOESN'T MAKE ANY RECOLLECTION OF IT. OF THOSE PAYMENTS, 12 WERE MADE AFTER THE DEFICIENCY NOTICE EVEN.

SO HERE WE'VE GOT ALL OF THIS MONEY COMING IN TO THE I.R.S., AND THEY WANT THESE PEOPLE TO ADMIT CERTAIN THINGS THAT THE I.R.S. HAS THE BURDEN TO PROVE. AND WHEN THE BOYCES REFUSE TO ADMIT, THEY GO AND GET A SUMMARY JUDGMENT ON NUMBERS THAT [25]

DON'T EVEN REFLECT THE TRUTH. AND NOW THEY WANT TO USE IT AS RES JUDICATA. THAT'S ALL. THANK YOU.

THE COURT: THANK YOU. ANY LAST STATEMENTS, MR. DARMSTADTER?

MR. DARMSTADTER: YOUR HONOR, JUST –

THE COURT: YOU HAVE ONE MINUTE.

MR. DARMSTADTER: JUST BRIEFLY, YOUR HONOR. LET ME TALK ABOUT THE WAIVER ISSUE. I THINK IT'S SOMEWHAT DISINGENUOUS FOR MR. SHEPARD TO ARGUE THAT HE'S BEEN IN [sic] UNAWARE THAT THAT THE GOVERNMENT INTENDS TO RELY UPON THE RES JUDICATA ISSUE. I HAVE DISCUSSED THAT WITH MR. SHEPARD ON NUMEROUS OCCASIONS. AND THAT'S ALL SET FORTH IN MY DECLARATION WITH RESPECT TO THE CONTINUANCE, AS WELL AS I HAVE TALKED WITH MR. SHEPARDS' PREDECESSOR WITH RESPECT TO THAT.

WITH RESPECT TO THE ISSUE OF NOT INVOLVING THE SAME CLAIM, THERE ARE NUMEROUS CASES OUT THERE. IN FACT, WE CITE THEM IN OUR REPLY BRIEF.

THE COURT: I'M AWARE OF WHAT YOU CITED IN YOUR REPLY BRIEF.

MR. DARMSTADTER: OKAY.

THE COURT: OKAY. COUNSEL, I'LL TAKE THIS MATTER UNDER SUBMISSION. I INTEND TO ISSUE AN ORDER BY THE END OF THE WEEK, SO

HOPEFULLY THAT WILL HELP YOU, BUT I WANT YOU TO THINK ABOUT IT MORE CAREFULLY AND TO DIGEST WHAT YOU HAVE SAID HERE IN YOUR ARGUMENTS, SO I'LL ISSUE AN ORDER BY THE END OF THE [26] WEEK.

MR. DARMSTADTER: THANK YOU.

(ADJOURNED.)

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CERTIFICATION

I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE ON FEBRUARY 7, 2000; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: JUNE 4, 2001, AT SAN DIEGO, CALIFORNIA.

/s/ Rosanna Heywood
ROSANNA HEYWOOD,
OFFICIAL REPORTER

CSR NO. 7989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)
PLAINTIFF,	) CASE NO. 99CV0003-L
-V-	) SAN DIEGO, CALIFORNIA
JAMES BOYCE, ET AL.,	) DECEMBER 11, 2000
DEFENDANTS.	) 10:38 A.M.
**********	)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE M. JAMES LORENZ
WITHOUT A JURY

* * *

[2] **SAN DIEGO, CALIFORNIA;**
MONDAY, 12/11/00; 10:38 A.M.

DEPUTY CLERK: NO. 10 ON CALENDAR, CASE NO. 99CV0003, USA VERSUS JAMES BOYCE, ET AL, FOR MOTION HEARING.

MR. DARMSTADTER: GOOD MORNING, YOUR HONOR. HENRY DARMSTADTER ON BEHALF OF THE GOVERNMENT.

THE COURT: ALL RIGHT.

MR. SHEPARD: GOOD MORNING, YOUR HONOR. RICH SHEPARD, ON BEHALF OF MR. BOYCE. MY INVESTIGATOR IS TO MY LEFT AND THE BOYCES ARE IN COURT, RIGHT BEHIND ME.

THE COURT: OKAY. THE GOVERNMENT HAD RENEWED THE MOTION FOR PARTIAL SUMMARY JUDGMENT AND THEN THERE ARE

COUNTER-MOTIONS. LET'S START WITH THE GOVERNMENT.

MR. DARMSTADTER: YES, YOUR HONOR. AS THE COURT IS AWARE, THE TAX COURT LIABILITIES AT ISSUE WERE ADJUDICATED IN THE TAX COURT, AFFIRMED BY THE NINTH CIRCUIT. THE PURPOSE FOR THIS ACTION, OR AT LEAST THE PRIMARY PURPOSE, IS BECAUSE OF THE CONVOLUTED TITLE HISTORY ON THE BOYCES' PROPERTY.

IT HAS BEEN A POSITION OF THE GOVERNMENT, THROUGHOUT THIS CASE, THAT THE TAX LIABILITIES, THE AMOUNT OF THE TAX LIABILITIES, IS RES JUDICATA. JUDGE GONZALEZ, BEFORE SHE TRANSFERRED THE CASE TO YOUR HONOR, AGREED WITH US IN A FAIRLY LENGTHY ORDER. SHE INDICATED THAT THERE WERE SEVERAL ACCOUNTING ISSUES AND THEN, OF COURSE, THE MAIN FORECLOSURE ISSUE THAT WERE LEFT IN THE CASE.

IT'S BEEN MY EXPERIENCE THAT USUALLY THESE ACCOUNTING [3] ISSUES ARE RESOLVED INFORMALLY OR AMONGST THE ATTORNEYS OR AMONGST THE IRS AND THE CPAS, BUT NOT SO IN THIS CASE.

THE BOYCES REPRESENTED TO JUDGE GONZALEZ AT THE TIME OF THE PRIOR MOTION FOR PARTIAL SUMMARY JUDGEMENT – AND BASICALLY WITH THOSE REPRESENTATIONS, I AGREED TO WITHDRAW A PORTION OF OUR MOTION – THAT THERE WERE PAYMENTS THAT HAD BEEN MADE ON THESE TAX LIABILITIES THAT HAD NOT BEEN

CREDITED BY THE IRS. FOLLOWING THE JUDGE'S ORDER, THE PARTIES HAVE ENGAGED IN EXTENSIVE DISCOVERY ON THAT ISSUE. AND I TRIED, THROUGH MY LEVEL BEST, TO IDENTIFY THESE SO-CALLED MISSING PAYMENTS. I DID SO IN WRITTEN DISCOVERY AND INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS. I DEPOSED THE BOYCES AND I ASKED THEM SPECIFICALLY WHAT PAYMENTS WERE MISSING. AND I DID NOT COME UP WITH ANY KIND OF DEFINITIVE RESPONSE.

I ALSO MADE THE PRINCIPAL REVENUE OFFICER, WHO COLLECTED THESE LIABILITIES, AVAILABLE. HE FLEW DOWN FROM SANTA CRUZ TO SIT FOR A DEPOSITION. HE ALSO WAS PREPARED TO RECONCILE ANY MISSING PAYMENTS, BASED UPON DOCUMENTS THAT WE HAD.

THE BOYCES' ATTORNEY DIDN'T ASK HIM ANY QUESTIONS ON THAT MATTER. THE BEST WE COULD GET IS – AND I ATTACHED THIS EXHIBIT L TO THE BOYCES' DEPOSITION TRANSCRIPT, WHICH WE HAVE LODGED WITH THE COURT – IS A STACK OF DOCUMENTS REFLECTING PAYMENTS. I ASKED REVENUE OFFICER YARBOROUGH TO ATTEMPT TO RECONCILE THAT AND HE DID THAT IN THIS DECLARATION.

[4] IN RESPONSE TO THE MOTION, THE BOYCES SUBMITTED ANOTHER GROUP OF DOCUMENTS THAT WE OBJECT TO ON EVIDENTIARY GROUNDS, BUT IT JUST DOESN'T SEEM TO US THAT THERE IS [sic] ANY MISSING PAYMENTS. THIS IS NOT AN

ISSUE THAT HAS BEEN BROUGHT FORTH IN GOOD FAITH.

WITH RESPECT TO THE PARTICULAR NEW, SO-CALLED PAYMENTS THAT HAVE BEEN GENERATED – THAT IS EXHIBIT 23 TO THE BOYCES' MOTION. IF I COULD JUST GRAB THAT HERE BECAUSE I DID, OVER THE WEEKEND, LOOK THOUGH THESE.

THE COURT: OKAY.

MR. DARMSTADTER: ON THE SECOND PAGE OF THE EXHIBIT, I WAS ABLE TO FIND WHERE AT LEAST ONE – THIS $17.25 PAYMENT WAS, IN FACT, CREDITED. AND THAT IS – CAN BE FOUND ON JAMES BOYCE'S 4340, WHICH IS THE CERTIFICATE OF ASSESSMENTS AND PAYMENTS, WHICH WAS MARKED AS GOVERNMENT'S EXHIBIT L, PAGE FOUR. AND I DID FIND THE $17.25 CREDIT.

THE $14.83 CREDIT BELOW THAT – I AM NOT ALTOGETHER SURE IF THAT REFLECTS A LEVY. IT SAYS "ORDER TO WITHHOLD PERSONAL INCOME TAX." AND I AM NOT ALTOGETHER SURE. AND I CAN'T SAY. I AM JUST SPECULATING. BUT I DON'T KNOW THAT THAT IS AN ACTUAL PAYMENT.

ON THE FOLLOWING PAGE WE SEE TWO MISCELLANEOUS DEBITS FROM SOUTHWEST BANK. ONE IS IN THE AMOUNT OF $8,838.62. THE OTHER IS IN THE AMOUNT OF $8,946.48.

THE FOLLOWING PAGE, MR. SHEPARD, THE BOYCES' COUNSEL, [5] CIRCLED AS NO. 10, REFLECTS A CHECK IN THE AMOUNT OF $17,785.10, WHICH IS THE SUM OF THE TWO DEBITS.

THIS AMOUNT, THIS $17,000 FIGURE, IS REFLECTED IN THE TRANSCRIPT OF ACCOUNTING. AND IT IS DISCUSSED IN REVENUE OFFICER YARBOROUGH'S DECLARATION. SO I DON'T UNDERSTAND WHY THE BOYCES ARE CONFUSED ABOUT THE APPLICATION OF THIS PAYMENT, BUT THEY DID GET CREDIT FOR IT.

ON THE VERY FIRST PAGE OF EXHIBIT 23 ARE THREE BANK OF AMERICA CHECKING DEBITS: ONE IN THE AMOUNT OF $15, ONE IN THE AMOUNT OF $404.20, AND THE FINAL ONE IN THE AMOUNT OF $345. I WAS UNABLE TO FIND ANY CORRESPONDING CREDIT FOR THESE ITEMS. BUT I AM SOMEWHAT SUSPICIOUS IF, IN FACT, THESE WERE RESPONDING TO IRS LEVIES BECAUSE OF THE LEVY NUMBER UP HERE.

I DON'T BELIEVE THAT IS AN IRS LEVY NUMBER. IT MAY HAVE BEEN THE STATE OF CALIFORNIA FRANCHISE TAX FORM LEVY. AGAIN, I AM UNCERTAIN. AND I JUST DON'T KNOW. BUT OTHER THAN THAT, YOUR HONOR, I DO NOT KNOW OF ANY PAYMENTS, SPECIFIC PAYMENTS THAT THE BOYCES ARE ALLEGING THAT THEY DID NOT RECEIVE CREDIT FOR ON THAT ISSUE.

NOW, AS TO THE AMOUNTS OF THE ASSESSMENTS. THE TAX COURT, OF COURSE, ADJUDICATED WHAT THE LIABILITY SHOULD BE. AND I TAKE IT IT'S THE BOYCES' ALLEGATION THAT SOMEHOW WE DID NOT ASSESS THOSE LIABILITIES IN ACCORDANCE WITH THE TAX COURT'S INSTRUCTIONS.

I AM NOT SURE WHAT SPECIFIC ITEMS THEY ARE [6] COMPLAINING ABOUT NOW. IN THEIR REPLY BRIEF THEY DID INDICATE THAT THEY ARE CONFUSED AS TO HOW THE FRAUD PENALTIES WERE CALCULATED FOR BOTH TAXPAYERS IN THE YEARS '82, '83 AND '84. AND THAT IS BECAUSE THE CALCULATIONS ARE BASED UPON A PERCENTAGE OF INTEREST AS SET FORTH IN THE TAX COURT'S DECISION.

BUT OTHER THAN THAT, I CAN FIND NO DISCREPANCIES BETWEEN WHAT THE TAX COURT ORDERED AND WHAT IS REFLECTED IN OUR CERTIFIED TRANSCRIPTS. PART OF THE PROBLEM WAS THAT THE INITIAL ASSESSMENTS, THE JEOPARDY ASSESSMENTS MADE BY THE IRS WERE DIFFERENT FROM THOSE LIABILITIES THAT WERE ADJUDICATED BY THE TAX COURT. THIS RESULTED IN THE IRS HAVING TO MAKE ADJUSTMENTS TO CONFORM TO THE TAX COURT'S DECISION. BUT, AGAIN, IT'S IMPOSSIBLE FOR THE GOVERNMENT TO REALLY ARGUE NUMBERS IF WE DON'T KNOW WHAT NUMBERS THEY ARE CONTENDING DON'T MAKE ANY SENSE.

AND I HAVE LOOKED AT THE TAX COURT DECISION. I HAVE LOOKED AT THE 4340S, AND THEY LOOK CONSISTENT RIGHT DOWN THE LINE TO ME. AND, OF COURSE, THE BOYCES HAVE NOT ASSERTED IN ANY WAY, SHAPE, OR FORM WHAT THEY THINK THEY OWE IN TERMS OF THESE TAX LIABILITIES, IF ANYTHING.

WITH RESPECT TO THE CONSTITUTIONAL ISSUES, YOUR HONOR, I DID RECEIVE MR. BOYCE'S

BRIEF ON THE *WHITE* CASE. I GUESS IT'S OUR PRIMARY POSITION THAT ALL OF THESE CONSTITUTIONAL ISSUES ARE REALLY RES JUDICATA. THEY SHOULD [7] HAVE BEEN RAISED IN THE TAX COURT. THEY SHOULD HAVE BEEN RAISED IN THE NINTH CIRCUIT. AND THE BOYCES CAN'T NOW RAISE OTHER ISSUES TO SHOW THAT THEY DON'T OWE THESE TAX LIABILITIES.

BUT PUTTING THAT ASIDE, I DID READ THE *WHITE* CASE. AND IT APPEARED TO ME THAT THAT FOCUSED ON PUNISHING PEOPLE FOR EXERCISING THEIR FIRST AMENDMENT RIGHTS. IF THE COURT WOULD TAKE A LOOK AT WHAT THE TAX COURT DID IN ITS OPINION IN DETERMINING WHY IT WAS UPHOLDING THE FRAUD PENALTIES ASSERTED BY THE IRS – AND THAT IS EXHIBIT 1, PAGES 14 THROUGH 15. AND THAT HAS BEEN ATTACHED TO THE GOVERNMENT'S MOVING PAPERS.

THE TAX COURT SPECIFICALLY FOUND THAT THE BOYCES WERE SUBJECT TO FRAUD PENALTY BECAUSE THEY WILLFULLY FAILED TO FILE THEIR RETURNS; THEY FAILED TO MAINTAIN ADEQUATE RECORDS; THEY REFUSED TO COOPERATE WITH THE IRS IN CONNECTION WITH THE AUDIT; THEY ATTEMPTED TO CONCEAL THEIR ASSETS TO PREVENT COLLECTION OF THE TAX LIABILITIES. AND THEN, IN GENERAL, THEY INTENDED TO EVADE PAYMENT OF TAXES. TO ME THOSE ARE NOT FIRST-AMENDMENT-VARIETY-TYPE ACTIONS. THOSE ARE OTHER ACTIONS.

YOUR HONOR, I JUST DON'T WANT TO REPEAT WHAT IS IN THE BRIEF.

THE COURT: THAT IS FINE. THAT IS HELPFUL. IT KIND OF ZEROS IN ON AT LEAST THE GOVERNMENT'S MAIN ISSUES, SO THAT WILL BE FINE. COUNSEL?

MR. SHEPARD: THANK YOU, YOUR HONOR. I THINK I'LL RESPOND DIRECTLY TO WHAT MR. DARMSTADTER SAYS AND THEN GO INTO [8] SOME OF THE THINGS THAT I THINK THE COURT NEEDS TO LOOK AT.

I, FIRST OF ALL, TAKE ISSUE WITH MR. DARMSTADTER'S SUGGESTION THAT ANY OF THIS HAS NOT BEEN BROUGHT IN GOOD FAITH. IT HAS DEFINITELY BEEN BROUGHT IN GOOD FAITH. IF THERE IS A GOOD FAITH QUESTION, WE SUGGEST, IN FACT, THAT IT IS ON THE PART OF THE GOVERNMENT.

WE HAVE A CASE HERE THAT IS BASED ON TWENTY-YEAR-OLD EVIDENCE. AND THE GOVERNMENT WAITS UNTIL THE LAST POSSIBLE MOMENT TO BRING THE BOYCES BEFORE THE COURT, AND THEN SEEMS TO THINK THAT IT SHOULD BE UP TO THE BOYCES TO MAKE PROOF WHEN THE GOVERNMENT IS THE PLAINTIFF.

TWICE, YOUR HONOR, IN MR. DARMSTADTER'S STATEMENT – INSOFAR AS THE RECONCILIATION OF PAYMENTS – HE ADMITTED THAT HE WAS SPECULATING. TWICE HE ADMITTED THAT HE WAS UNCERTAIN. FOUR TIMES, THEN, HE ADMITTED THERE WERE MATERIAL ISSUES OF FACT.

AS WE INDICATED IN OUR MEMORANDUMS, THE AMOUNTS OF PAYMENT THAT ARE AT ISSUE ARE MATTERS FOR WHICH THE BOYCES WOULD NOT BE THE PRIMARY RECORD KEEPERS.

THESE LEVIES WENT TO THE BANKS. MR. YARBOROUGH OR SOMEBODY ELSE SIGNED THEM, THE BANKS RESPONDED TO THEM OR THEY DIDN'T – WE DON'T EVEN KNOW – AND SENT THE MONEY TO THE GOVERNMENT. THE BOYCES MAY OR MAY NOT HAVE BEEN GIVEN ANY KIND OF NOTICE FROM EITHER THE GOVERNMENT OR THE BANKS, YET THE GOVERNMENT SEEMS TO THINK THAT IT IS OUR BURDEN TO SHOW HOW [9] MUCH WE PAID.

NOW, MY EXPERIENCE IN ORDINARY DEBTOR/CREDITOR SITUATIONS NOT INVOLVING THE GOVERNMENT AND NOT INVOLVING TAXES, WHEN A DEBTOR COMES ALONG AND SAYS YES, YOU ARE RIGHT; I OWE YOU SOMETHING BUT I NEED TO FIGURE IT OUT AND I NEED YOUR HELP, USUALLY THE CREDITOR COMES ALONG AND SAYS OKAY. HERE IS AN ACCOUNTING. HERE ARE MY RECORDS.

WHAT WE GOT FROM THE GOVERNMENT WAS AN ADMINISTRATIVE FILE THAT AT MOST MIGHT HAVE VALIDATED THE BANK RECORDS METHOD FOR CALCULATING THE AMOUNT OF TAX DUE. THE RECORDS THAT WOULD HAVE REFLECTED PAYMENTS, THE VARIOUS FORMS THAT HAVE TO BE FILLED OUT – AND ALL OF THAT IS LAID OUT PRETTY THOROUGHLY IN MR. YARBOROUGH'S DEPOSITION – WEREN'T THERE BECAUSE THE

COLLECTIONS FILE THAT THE GOVERNMENT IS BOUND TO MAINTAIN WASN'T THERE.

SO WE HAVE A SITUATION WHERE THE GOVERNMENT WAITS UNTIL THE LAST POSSIBLE MINUTE, TWENTY YEARS AFTER THE YEARS AT ISSUE – FIFTEEN TO TWENTY YEARS AFTER THE YEARS AT ISSUE. AND NOW THEY WANT TO HOLD THE BOYCES RESPONSIBLE FOR PRODUCING RECORDS THAT THEY THEMSELVES DESTROYED.

I CAN'T EMPHASIZE, IN MY MIND, HOW IMPORTANT IT IS TO REMEMBER THAT THE GOVERNMENT HERE IS THE PLAINTIFF. THE GOVERNMENT CONTINUES TO ARGUE THAT IT HAS A PRESUMPTION OF CORRECTNESS AS TO ITS 4340. WELL, WE HAVE ARGUED THAT THEY DON'T HAVE THAT PRESUMPTION OF CORRECTNESS. AND I WILL GO INTO [10] SOME OTHER REASONS WHY I THINK THAT DOESN'T APPLY HERE. BUT THAT IS THE DOCUMENT THAT THEY HAVE GIVEN US, UPON WHICH WE CAN FIGURE OUT HOW MUCH IS DUE. AND AS I'LL EXPLAIN, AND HAVE EXPLAINED IN PRIOR RECORDS, THERE IS NO WAY TO FEEL COMFORTABLE THAT THAT DOCUMENT IS RELIABLE.

NOW, INSOFAR AS THE *WHITE* ARGUMENT BEING RAISED IN THE TAX COURT AND WITH THE NINTH CIRCUIT, THE *WHITE* DECISION WAS HANDED DOWN TWO MONTHS AGO – NO. THREE MONTHS AGO. THE TAX COURT CASE AND THE NINTH CIRCUIT OF APPEAL WERE EIGHT AND NINE YEARS AGO, RESPECTIVELY.

I DON'T SEE HOW THE BOYCES COULD POSSIBLY HAVE KNOWN THAT THIS MIGHT HAVE BEEN A

VIABLE ARGUMENT AT THAT TIME. I THINK IT'S PRETTY CLEAR THAT THERE HAS BEEN EITHER A MODIFICATION OR A FURTHER CLARIFICATION OF THE LAW THAT THE BOYCES MIGHT NOT HAVE KNOWN ABOUT AT THE TIME.

I HAVE TALKED ABOUT, IN MY BRIEFS, THE GOVERNMENT'S CLAIM THAT THEY FAILED TO FILE RETURNS. AND I WILL POINT OUT THAT FIRST THEY HAVEN'T SHOWN IT. THEY JUST CLAIMED IT.

SECOND, EVEN IF IT'S TRUE, OUR POSITION IS THAT THEY HAD ARGUED TO THE TAX COURT THAT THEY DIDN'T HAVE TO FILE, AND THAT IT WASN'T UNTIL THE TAX COURT DECIDED THAT THEY DID THAT THE OBLIGATION ACCRUED. OTHERWISE THERE IS A DUE PROCESS PROBLEM, BECAUSE IF YOU HAVE A FRANK DIFFERENCE OF OPINION, AS IS IDENTIFIED IN THE *CHEEK* DECISION, THEN YOU ARE BOUND AND HAVE THE RIGHT TO TAKE IT TO COURT AND HAVE THAT FRANK [11] DIFFERENCE OF OPINION RESOLVED.

THAT IS EXACTLY WHAT THEY DID. IT WAS A LOSING ARGUMENT, THEY GRANT THAT. BUT JUST BECAUSE THE GOVERNMENT SAYS YOU HAVE TO DO SOMETHING AND WHEN YOU READ THE LAW YOU THINK YOU DON'T, DOESN'T MEAN YOU ARE PENALIZED UNTIL THE COURT SAYS YOU DO.

INSOFAR AS REFUSAL TO COOPERATE, I HAVE ALSO ADDRESSED THAT. THEY WERE STANDING ON THEIR FIFTH AMENDMENT GROUNDS. THE GOVERNMENT WAS ASKING THEM TO ADMIT CRIMINAL ACTS. THAT IS WHAT – THE WHOLE TAX COURT CASE HAD TO DO WITH UNANSWERED

ADMISSIONS. THERE IS NO EVIDENCE BEFORE THE COURT. THERE IS A JUDICIALLY CREATED PRESUMPTION BEFORE THE TAX COURT. AND WE UNDERSTAND THAT YOU CAN'T GO BEHIND IT. BUT TO SAY THAT THERE WAS A SOLID BASIS FOR REFUSAL TO COOPERATE, A SOLID BASIS FOR FAILURE TO FIND, A SOLID BASIS FOR CONCEALED ASSETS, THAT IS NOT TRUE. WHAT YOU HAVE IS AN UNANSWERED ADMISSION WHICH, ACCORDING TO THE TAX RULES ITSELF, ARE – AND IN ALL THE CASE LAW THAT SUPPORTS THE TAX COURT RULE 90, BASICALLY SAY THAT THERE CAN BE MULTIPLE REASONS FOR ANSWERING OR NOT ANSWERING AN ADMISSION. SO JUST BECAUSE THEY DIDN'T ANSWER DOESN'T MEAN THAT ANY OF THIS STUFF IS TRUE.

NOW, LET'S GET TO THE SUBSTANCE. THE CERTIFICATES OF ASSESSMENTS AND PAYMENTS THAT THE GOVERNMENT IS RELYING ON, EXHIBITS K THROUGH P, ON THE CLERK'S PAPER 42, ARE NOT FORMS 4340. WE HAVE SAID SO ALL ALONG. THE GOVERNMENT HAS NEVER [12] DENIED THAT. THEY HAVE KIND OF CLANDESTINELY TRIED TO SUGGEST THAT THEY ARE, BUT THEY ARE NOT 4340S. NOWHERE ON EITHER THE CERTIFICATE OF RECORD OR THE CERTIFICATE OF ASSESSMENTS AND PAYMENTS IS, IN FACT, THE NUMBER 4340.

AND I AM NOT AWARE OF ANY IRS FORM THAT DOESN'T HAVE A NUMBER. IN FACT, THE GOVERNMENT IMPLICITLY ACKNOWLEDGES THIS WHEN THEY ARE ARGUING THE AUTHENTICITY ISSUE ON MR. OR MRS. WASHINGTON'S SIGNATURE. I DON'T KNOW ABOUT YOU, YOUR HONOR, BUT I DON'T

KNOW WHETHER E.M. WASHINGTON IS A MALE OR A FEMALE. BUT WHEN THE COURT WAS SEEKING TO JUSTIFY E.M. WASHINGTON'S SIGNATURE, THEY OFFERED IN THE DELEGATION OF AUTHORITY, WHICH WAS EXHIBIT U ON CLERK'S PAPER 92.

AND IN PARAGRAPH EIGHT ON CLERK'S PAPER NO. 92, THE COURT IMPLICITLY ACKNOWLEDGES THAT THERE IS [sic] REALLY TWO FORMS THAT ARE RELEVANT TO THIS CASE BECAUSE THEY SAY THAT THE DELEGATION OF AUTHORITY DELEGATES AUTHORITY TO SIGN 4340S AND 2866S. NOW IT HAPPENS THAT 2866S ARE IN THE FILE.

AND WHAT 2866S ARE ARE CERTIFICATES OF RECORD. THEY JUST SIMPLY CERTIFY THAT THERE IS THIS DOCUMENT ON FILE. THEY DON'T CERTIFY THE TRUTH OF THE MATTER THAT IS CONTAINED IN THE DOCUMENT. THEY JUST SIMPLY CERTIFY THAT THIS IS A DOCUMENT THAT THE GOVERNMENT HAS.

NOW, LET'S GET TO THE DELEGATION. THIS IS EXHIBIT U. WE DON'T KNOW WHO SIGNED IT. THERE ARE TWO SIGNATURES ON THAT EXHIBIT U, BUT WE DON'T KNOW WHO THEY ARE. AS I INDICATED, WE [13] DON'T KNOW WHO E.M. WASHINGTON IS.

NOW, THE CERTIFICATE OF ASSESSMENTS AND PAYMENTS REFLECTS THAT E.M. WASHINGTON IS THE CHIEF OF THE COLLECTIONS DIVISION OR THE CHIEF OF THE ACCOUNTING DIVISION. I CAN'T REMEMBER WHICH, BUT THAT AMOUNTS TO HEARSAY BECAUSE IT'S ASSERTING THE TRUTH OF THE MATTER CONTAINED THEREIN. WE DON'T

KNOW WHO E.M. WASHINGTON IS BECAUSE WE DON'T HAVE ANY RECORD OF E.M. WASHINGTON BEING ANYWHERE OTHER THAN ON THE CERTIFICATE WHICH – THE AUTHENTICITY OF WHICH WE ARE CHALLENGING.

NOW, LET'S ASSUME FOR A MINUTE THAT – SET THE AUTHENTICITY ISSUE ASIDE AND THE IDENTITY OF E.M. WASHINGTON ASIDE FOR A MINUTE AND LET'S LOOK AT THE NUMBERS THAT ARE IN THE CERTIFICATE. AS I HAVE ALREADY OUTLINED IN MY REPLY BRIEF, THAT IS CLERK'S PAPER 130, AT PAGES 9 TO 11, THE CERTIFICATE DOES NOT RECONCILE WITH THE TAX COURT JUDGMENT. MR. DARMSTADTER SEEMS TO THINK MAYBE IT DOES BECAUSE THERE IS THIS PERCENTAGE THAT WAS ADDED WITH INTEREST. PRETTY BALD-NAKED STATEMENT, IT SEEMS TO ME. HE MAY BE RIGHT; HE MAY BE NOT. BUT HOW DO WE VERIFY THAT AND HOW DOES THE COURT VERIFY THAT?

I MEAN, THIS IS SUPPOSED TO BE A SUMMARY JUDGMENT MOTION. NO MATERIAL DISPUTED FACT. AND WHAT WE HAVE IS MR. DARMSTADTER'S UNSUPPORTED ASSERTION. WE HAVE BEEN MAKING THIS BIG COMPLAINT ABOUT THE INTEREST ALL ALONG, AND THE GOVERNMENT SEEMS TO THINK THAT THEY DON'T HAVE TO EXPLAIN IT. [14] AND I BRING YOU BACK TO THE POINT THAT I MADE EARLIER. IN AN ORDINARY DEBTOR/CREDITOR SITUATION, IF THE DEBTOR DOESN'T UNDERSTAND WHAT IS GOING ON, THE CREDITOR EXPLAINS IT. NOT SO HERE.

AND I'LL TELL YOU WHY. MY SPECULATION IS THAT THE GOVERNMENT WON'T EXPLAIN IT BECAUSE THEY CAN'T EXPLAIN IT. THEY DON'T KNOW WHAT IS GOING ON.

SECOND, THE CERTIFICATE THAT THE GOVERNMENT IS RELYING ON – THEIR EXHIBITS K THROUGH P; IT'S AT CLERK'S PAPER 42 – IS ENTITLED TO A PRESUMPTION OF CORRECTNESS, THEY SAY. WELL, WE ALSO SUBMITTED A CERTIFICATE OF ASSESSMENTS AND PAYMENTS PREPARED IN FEBRUARY OF 1991 BY A FELLOW BY THE NAME OF ZANARINI. WELL, IF ONE CERTIFICATE IS ENTITLED TO A PRESUMPTION OF CORRECTNESS, SO IS THE OTHER. AND THEY BOTH HAVE TWO DIFFERENT NUMBERS. THE PRESUMPTION HAS TO FAIL.

ZANARINI'S CERTIFICATE THAT I AM TALKING ABOUT IS AT CLERK'S PAPER EXHIBIT F. I AM SORRY. CLERK'S PAPER 49. EXHIBIT F. MOREOVER, THE CERTIFICATE DONE IN 1991 WAS DONE IN CLOSER PROXIMITY IN TIME TO THE TRUE EVENTS. IT'S REASONABLE TO BELIEVE THAT ZANARINI – AND THIS GOES TO THE ASTIN ARGUMENT – THAT ZANARINI DID THE JOB THE WAY IT'S SUPPOSED TO BE DONE. AND THAT HE HAD THE TAX COURT JUDGMENT IN HIS HANDS. HE HAD THE INDIVIDUAL MASTER FILE IN HIS HANDS. AND HE ADDED AND SUBTRACTED AND ABATED ACCORDING TO THE STATUTE AND ACCORDING TO THE TAX COURT JUDGMENT.

[15] AND THE REASON IT'S POSSIBLE, WE THINK, THAT HIS NUMBERS COME OUT SO MUCH LOWER IS, ONE HIS CERTIFICATE, WE BELIEVE,

PRESUMES A JOINT RETURN, WHEREAS THE GOVERNMENT'S CERTIFICATES MADE A YEAR AGO PRESUME SEPARATE – MARRIED, FILING SEPARATELY.

AND BY THE WAY, I SHOULD POINT OUT THAT THE 1040S THAT THE BOYCES SUBMITTED FOR '79, '80, AND '81, EVEN THOUGH THEY SAID OBJECTION AND ALL OF THAT, THEY DID REPRESENT THAT THE BOYCES WERE MARRIED, FILING JOINTLY. SO THERE IS A PRESUMPTION THAT THAT IS THE WAY THEY WOULD DO IT, AND IT SEEMS TO ME THAT THEY SHOULD BE ASSESSED THAT WAY. AND WE HAVE SHOWN IN SOME OTHER PLEADINGS THAT THAT WOULD HAVE MADE ABOUT, YOU KNOW, A COUPLE THOUSAND DOLLARS DIFFERENCE ANYWAY. BUT THE OTHER THING THAT MIGHT HAVE HAPPENED HERE IS THAT MR. ZANARINI MIGHT HAVE BEEN AWARE OF THE ASSESSMENT STATUTE EXPIRATION DATE THAT WE JUST RAISED AS AN ISSUE.

NOW, WE DON'T KNOW. THE RELIABILITY OF THOSE ASSESSMENTS, THAT STATUTE EXPIRATION DATE DEPENDS ON RECORDS THAT NO LONGER EXIST; THAT THE GOVERNMENT DESTROYED. BUT IF, IN FACT, THERE HAD BEEN PRIOR ASSESSMENTS PRIOR TO THE JEOPARDY, THEN ZANARINI'S NUMBERS WOULD HAVE BEEN RIGHT, OR COULD HAVE BEEN RIGHT.

AS I HAVE INDICATED, ALL OF THIS COULD HAVE BEEN FAR MORE EASILY RESOLVED IF THE GOVERNMENT HADN'T DESTROYED ITS COLLECTION FILE. THEY HAVE NO EXPLANATION FOR IT

EXCEPT, AT [16] BEST, INADVERTENCE. THIS IS AN OPEN COLLECTIONS FILE, BY THEIR ALLEGATIONS, INVOLVING SEVERAL HUNDREDS OF THOUSANDS OF DOLLARS – AND THEY CLOSE THE FILE.

NOW, WHY WOULD THEY DO THAT? STUPIDITY? IGNORANCE? THINKING THAT THE ACCOUNTANT WAS PAID? WOULD THEY DO THAT KNOWING THAT THERE WAS AN OUTSTANDING BALANCE OF SEVERAL HUNDRED THOUSAND DOLLARS? THAT IS NOT REASONABLE TO ASSUME. BUT THEY DID DESTROY THE FILE.

SO IN THE ABSENCE OF ALL OF THIS EVIDENCE THAT WOULD OTHERWISE BE THERE, THE GOVERNMENT ASKED THE COURT TO MAKE DETERMINATIONS OF FACT, THAT IS TO SAY, ACCEPT MR. YARBOROUGH'S EXPLANATION OF EVENTS FOR WHICH HE ADMITTED IN DEPOSITION HE HAD NO INDEPENDENT RECOLLECTION.

NOW, WE ALSO HAVE POINTED OUT THAT THE INDIVIDUAL MASTER FILES RECONCILED TO THE CERTIFICATES. AND MR. DARMSTADTER GOT MR. MALONEY TO SAY NO, THAT'S NOT TRUE; THEY DO RECONCILE.

WELL, WE STILL BELIEVE THAT THEY DON'T RECONCILE. WE THINK THAT MR. MALONEY TALKED ABOUT A COUPLE OF THINGS THAT MIGHT HAVE BEEN SUPPORTIVE AND THEN LEFT A NUMBER OF OTHER THINGS UNSAID.

IN PARTICULAR, WE TALK ABOUT THE INTEREST. THE IMF FOR 1982 FOR MR. BOYCE SHOWS AN

INTEREST ASSESSED AND A NET OF THE ASSESSMENTS AND THE ABATEMENTS OF $21,919 AND CHANGE. THE IMF, IF YOU WILL RECALL, WAS GENERATED IN APRIL OF 2000. AT [17] THE SAME TIME, THE GOVERNMENT'S EXHIBIT M, THE CERTIFICATE, SHOWS THAT THE ACCRUED INTEREST IS $71,286 AND CHANGE FOR THE SAME YEAR, FOR THE SAME PERSON. AND THE CERTIFICATE WAS CREATED IN OCTOBER OF '99. SO YOU WOULD THINK, IF ANYTHING, THE IMF SHOWING OF ACCRUED INTEREST WOULD BE GREATER THAN THE AMOUNT SHOWN ON THE CERTIFICATE BECAUSE IT WAS GENERATED SIX – ALMOST SEVEN MONTHS LATER.

IN FACT, THAT IS WHAT HAS TO HAPPEN, ACCORDING TO MR. MALONEY'S OWN DEPOSITION, BECAUSE MR. MALONEY DEPOSED THAT THEY UPDATE THE INDIVIDUAL MASTER FILE EVERY WEEK. AND I DIRECT YOU TO PAGE 28 OF HIS DEPOSITION.

NOW, 1983. AGAIN, THE IMF SHOWS THAT MR. BOYCE OWES $16,658 AND CHANGE IN ACCRUED INTEREST, AND THE CERTIFICATE SHOWS THAT HE OWES $64,093 AND CHANGE. AND FOR '94 THE IMF SHOWS THAT MR. BOYCE OWES $13,198 AND CHANGE, AND THE CERTIFICATE SHOWS THAT HE OWES $56,295 AND CHANGE. SO FOR MR. BOYCE ALONE, FOR THREE YEARS, WE HAVE A DISPARITY OF ALMOST $140,000.

NOW, IT'S OUR POSITION THAT THE SAME THING WOULD BE TRUE FOR MRS. BOYCE, AND FOR THE OTHER YEARS THERE IS AN INCREDIBLE

DISPARITY. NOW, THE GOVERNMENT SAYS WELL, WE SHOULD FORGET THE IMF OR FORGET THE CERTIFICATE ON THE INTEREST. PAY ATTENTION TO MS. PIAZZA'S DECLARATION. MS. PIAZZA, WHO WASN'T EVEN KNOWN TO US UNTIL A MONTH AFTER DISCOVERY, AND WHO SEEKS TO AUTHENTICATE A DOCUMENT THAT WE NEVER EVEN HAD SEEN BEFORE, [18] WHICH WE HAD REQUESTED IN DISCOVERY, AND THEN SHE DOESN'T EVEN BOTHER TO EXPLAIN WHAT SHE DID OTHER THAN TO PUNCH SOME BUTTONS ON A COMPUTER SOMEWHERE.

NOW, THE GOVERNMENT SAYS WELL, ALL WE HAVE TO DO IS GET A COPY OF MICHAEL SALTZMAN. HE HAS A WHOLE CHAPTER ON INTEREST. MICHAEL SALTZMAN IS NOT A WITNESS TO THIS CASE. HIS TREATISE ISN'T EVIDENCE, UNLESS THE COURT WOULD ADMIT TO A JURY, WHICH I SERIOUSLY DOUBT IT WOULD, AND MR. SALTZMAN DOESN'T SAY ANYTHING SPECIFIC TO THIS CASE.

SO, HERE WE HAVE THE GOVERNMENT BASICALLY SAYING THE BOYCES OWE THIS, THE BOYCES OWE THAT. WE ARE RIGHT. YOU CAN'T PROVE WE ARE WRONG, AND WE GO TO THE EFFORT OF TRYING TO FIND OUT WHAT EVIDENCE THERE IS, NOT HAVING ALL THAT MUCH OURSELVES AND WE FIND OUT EITHER THAT THE GOVERNMENT DOESN'T GIVE IT TO US, WHAT THEY HAVE, OR THEY HAVE DESTROYED IT.

NOW, IT'S OUR POSITION THAT THIS CASE ISN'T ABOUT THE MONEY. THIS CASE IS ABOUT PUNISHING THE BOYCES FOR TAKING THE LEGALLY

DISFAVORED POSITION IN THE LAW. AS I HAVE SHOWN YOU, THERE WAS A JEOPARDY ASSESSMENT WHEN THERE WAS TRULY NO JEOPARDY. THERE WAS CATEGORICAL REFUSAL TO ANSWER THEIR QUESTIONS AND EXPLAIN TO THEM WHAT THEY WERE DOING. THEY ARE REFUSING EVEN NOW. GO READ SALTZMAN.

AND ALL THEY WANT TO DO AT THIS POINT IS ARRIVE AT A NUMBER, MAKE PAYMENT ARRANGEMENTS, AND GET IT OVER WITH. BUT WHAT HAS HAPPENED IS THAT BECAUSE THIS BATTLE OF WILLS, IF YOU [19] WILL, HAS GONE ON FOR AS LONG AS IT HAS, THE GOVERNMENT HAS BEEN PILING ON ADDITIONS, PENALTIES, INTERESTS ON PENALTIES, INTEREST ON FACTS, THIS, THAT, AND THE OTHER THING, ALL OF WHICH IS DESIGNED AND INTENDED TO CHILL THE BOYCES' FIRST AMENDMENT RIGHT TO TAKE WHAT THEY CONSIDER VALID LEGAL ARGUMENTS TO COURT. THANK YOU.

THE COURT: THANK YOU. I'LL GIVE YOU ABOUT FIVE MINUTES TO RESPOND.

MR. DARMSTADTER: FIVE MINUTES. I'LL TRY TO MOVE THROUGH QUICKLY.

FIRST, YOUR HONOR, WITH RESPECT TO THE 4340S. THE BOYCES, I GUESS, ARE STILL CONTENDING THAT THEY ARE NOT ADMISSIBLE. THAT IS JUST COMPLETELY CONTRARY TO NINTH CIRCUIT PRECEDENT, WHICH I WON'T REPEAT HERE, THE CASES, AND ALL THE REST OF THEM THAT ARE CITED IN OUR BRIEFS. THEY ARE SELF-AUTHENTICATING DOCUMENTS AND ARE EXEMPT

FROM HEARSAY AS HAS BEEN FOUND BY THE NINTH CIRCUIT AND VARIOUS OTHER CIRCUITS THROUGHOUT THE COUNTRY.

WITH RESPECT TO THE SIGNATURE OF MS. WASHINGTON AUTHENTICATING THE DOCUMENTS, CHIEF JUDGE HUFF HAS DEALT WITH THAT ISSUE. QUITE FRANKLY, IT IS JUST A FRIVOLOUS ARGUMENT.

FOR SOME REASON MR. SHEPARD STILL CONTINUES TO LITIGATE WHAT HAS ALREADY BEEN LITIGATED AND ALREADY BEEN DETERMINED TO BE RES JUDICATA BY JUDGE GONZALEZ. AND I AM, OF COURSE, PRESUMING THAT YOUR HONOR IS GOING TO ABIDE BY JUDGE [20] GONZALEZ'S PRIOR ORDER.

IN THE FINAL ANALYSIS, IT ALL BOILS DOWN TO EVIDENCE. AND WE HAVE SUBMITTED, WE THINK, PROPER EVIDENCE AS TO THE AMOUNTS OF THESE TAX LIABILITIES. THE COURT IS CERTAINLY FREE TO CHECK THE IRS' MATH, IF IT WOULD LIKE. THE BOYCES, APPARENTLY, HAVE NOT, THEY HAVE NOT GONE TO A CPA OR AN ACCOUNTANT AND HAD THEM CHECK ON THE NUMBERS.

IT'S VERY EASY TO LOOK AT WHAT AMOUNT OF TAX WAS ADJUDICATED BY THE TAX COURT, SEE IF THAT AMOUNT IS REFLECTED ON THE 4340. IT'S ALSO VERY EASY TO DETERMINE PENALTIES AND DETERMINE WHETHER THOSE ARE REFLECTED ON THE 4340. WE HAVE DONE THAT. THOSE NUMBERS ARE CONSISTENT. AND WE SUBMITTED IT IN AN ACCEPTABLE EVIDENTIARY FASHION. THE BOYCES

HAVE PRESENTED NO EVIDENCE ANYWHERE IN THE RECORD AS TO WHAT THEY BELIEVE ARE THE TAX LIABILITIES OR IN WHAT WAY THE IRS ERRED IN THIS.

WITH RESPECT TO THE PAYMENTS, I HOPE THE RECORD IS CLEAR THAT THE GOVERNMENT MADE A GOOD FAITH ATTEMPT TO DETERMINE WHAT PAYMENTS THERE WERE AND IF THERE HAD BEEN ANY MISSING PAYMENTS. THE BOYCES SIMPLY DID NOT COOPERATE IN THAT EXERCISE AND NOW WE ARE HOLDING THEM TO THEIR BURDEN OF PROOF. THE BURDEN OF PROOF IN GENERAL ON A DEBTOR – THERE IS A BURDEN OF PROOF TO SHOW PAYMENTS. THIS IS FOR ANY KIND OF DEBT, NOT JUST TAX DEBTS.

THE BOYCES HAVE MADE A GREAT ISSUE OUT OF THE FACT [21] THAT A PORTION OF THE COLLECTION FILE WAS DESTROYED. THE REASON THAT FILE WAS DESTROYED WAS IT WAS IN ACCORDANCE WITH IRS POLICY AND PROCEDURE WHICH WE HAVE SET FORTH IN THE MOVING PAPERS

THE COLLECTION FILE WE HAVE CONTAINED COPIES OF SOME OF THE LEVIES, COPIES OF PAYMENTS THAT WERE RECEIVED, AND COPIES OF PAYMENT POSTING VOUCHERS, SOME OF WHICH DO EXIST. BUT WE HAVE SET FORTH WHY ALL OF THAT INFORMATION IS COMPUTERIZED. IT WOULD BE LIKE A DEBTOR COMING IN, WHEN A CREDITOR IS SEEKING A FORECLOSURE ON A MORTGAGE, AND SAYING WELL, THE CREDITOR DID NOT MAINTAIN CHECKS GOING BACK TEN YEARS, COPIES OF

THOSE CHECKS, SO I WANT THE ENTIRE MORTGAGE EXTINGUISHED. THE ISSUE IS IS THERE A PROPER RECORD OF THE PAYMENTS? AND IN THIS CASE THERE IS. THERE IS COMPUTERIZED RECORD THAT IS REFLECTED ON THE 4340S.

AND I CAN HONESTLY SAY THAT I HAVE DONE EVERYTHING IN MY POWER TO TRY TO DISCOVER IF THERE WERE ANY MISSING PAYMENTS. EXHIBIT 23 IS SIMPLY NOT EVIDENCE. IT'S NOT ADMISSIBLE EVIDENCE. IT'S SIMPLY PAYMENTS THAT HAVE NOT BEEN AUTHENTICATED, THAT ARE CLEARLY SUBJECT TO HEARSAY. AND THE BOYCES HAVE NOT EVEN MADE A CURSORY EFFORT TO DISCOVER IF THERE ARE ANY MISSING PAYMENTS. CERTAINLY A DEBTOR IS PRESUMED TO HAVE KNOWLEDGE OF WHAT THEIR PROPERTY IS AND IF THAT PROPERTY HAS BEEN TAKEN TO MAKE AN ACCOUNTING OF THAT, JUST AS THE GOVERNMENT HAS DONE AND HAS PRODUCED IN THESE 4340S.

[22] WITH RESPECT TO THE INTEREST, WE HAVE CITED AUTHORITY, AND PARTICULARLY THE *GHANDOUR* CASE OUT OF THE FEDERAL CLAIMS COURT. INTEREST IS IMPOSED BY LAW. IT'S NOT A MATTER OF EVIDENTIARY PROOF. IT'S SIMPLY TO COMPENSATE THE GOVERNMENT FOR THE TIME VALUE OF THE MONEY. THE GOVERNMENT HAS A COMPUTER PROGRAM THAT IS IN PLACE TO CALCULATE THE FULL AMOUNT OF THE INTEREST.

MR. SHEPARD AND THE BOYCES COULD HAVE CONDUCTED DISCOVERY ON THAT IF THEY WANTED. I WOULD HAVE PERMITTED IT. THEY

CHOSE NOT TO. THEY COULD HAVE GONE TO AN INDEPENDENT CPA OR ACCOUNTANT. I AM SURE ALMOST ANY COMPETENT ONE WOULD HAVE A COMPUTER PROGRAM THAT WOULD RUN INTEREST ON IT, AND THEY COULD HAVE CHECKED THE NUMBERS.

BUT IT IS SIMPLY WHEN A MONEY JUDGMENT IS ENTERED AND A SUM ASSERTED THE GOVERNMENT IS ENTITLED TO THE INTEREST JUST LIKE ANY OTHER CREDITOR.

THE COURT: WELL, MY UNDERSTANDING IS OBVIOUSLY THE UNDERLYING AMOUNT IS THE ISSUE IN QUESTION. HOWEVER, SO I AM CLEAR, IF THERE WAS AN UNDERLYING AMOUNT, THE COURT'S OBLIGATIONS IS TO FIND THE UNDERLYING AMOUNT, IF THEY CAN. IF THEY CAN'T, THEN WE RULE ACCORDINGLY. BUT IF THERE WAS SUCH AN UNDERLYING AMOUNT, THE COURT COULD ONLY ORDER THAT AMOUNT PLUS ACCRUED INTEREST. YOU ARE NOT LOOKING FOR A SET AMOUNT SET BY THE COURT, RIGHT?

MR. DARMSTADTER: YOUR HONOR, IN LIGHT OF THE HISTORY [23] OF THIS CASE, WE WOULD ASK FOR A JUDGMENT AS SET FORTH IN JULIE PIAZZA'S DECLARATION. AND I BELIEVE SHE CALCULATED INTEREST UP THROUGH JULY 1 OF –

THE COURT: 2000.

MR. DARMSTADTER: – OF 2000. AND THAT WOULD BE THE AMOUNT WE WOULD SEEK, PLUS STATUTORY INTERESTS THEREAFTER. AND THAT IS, OF COURSE, PROVIDED IN LAW. AND I HAVE

CITED THE SECTIONS OF THE INTERNAL REVENUE CODE. NOW, GRANTED, IT IS A CALCULATION THAT IS PROBABLY FAIRLY COMPLEX. BUT THAT IS SOMETHING THAT WE HAVE SUBMITTED EVIDENCE ON. AND THE BOYCES HAVE CHOSEN NOT TO.

I AGREE. THE INTEREST IS QUITE HIGH, BUT THAT SIMPLY DEMONSTRATES THE MAGIC OF COMPOUND INTEREST OVER SUCH A LENGTHY PERIOD OF TIME.

THE COURT: LET ME ASK YOU WHY – JUST IF YOU KNOW; MAYBE YOU DON'T – WHY WAS THIS CASE – I UNDERSTAND WHAT COUNSEL SAID. BUT WHAT IS THE GOVERNMENT'S POSITION AS TO WHY IT GOES OVER SUCH A LONG PERIOD OF TIME? IT GOES BACK TO '91 OR BEFORE THAT.

MR. DARMSTADTER: YOUR HONOR, THE TAX LIABILITIES WERE ADJUDICATED IN THE TAX COURT. THE NINTH CIRCUIT AFFIRMED THE IRS IS THEN GIVEN ADMINISTRATIVE COLLECTION POWERS. IT DOESN'T NEED TO GO TO COURT TO LEVY OR EXECUTE ON THESE ASSETS. IT CAN SEIZE BANK ACCOUNTS. IT CAN SEIZE REAL ESTATE AND HAVE THAT SOLD AT A TAX SALE. THE IRS CAME TO THE DEPARTMENT OF [24] JUSTICE AND SAID THAT BECAUSE OF THE CONVOLUTED TITLE HISTORY ON THE SLEEPING INDIAN ROAD PROPERTY, WHICH IS, OF COURSE, OUR TOPIC OF OUR MOTION FOR ENTRY OF JUDGMENT, THAT WE CAN'T SELL THIS ADMINISTRATIVELY. NO BUYER IS GOING TO COME OUT AND BUY IT BECAUSE THERE IS [sic] SO

MANY OF THESE STRANGE OFFSHORE ENTITIES THAT HAVE COME ON TITLE.

SO THEY ASKED US IF WE WOULD BRING THIS COLLECTION SUIT WITHIN THE TEN-YEAR STATUTE OF LIMITATIONS, WHICH WE DID DO, TO BASICALLY GET AN ORDER FROM THE COURT ADJUDICATING THAT WE HAVE A GOOD LIEN ON THAT PROPERTY SO THAT WE CAN SELL IT IN A FORECLOSURE SALE. AND THAT IS REALLY THE PURPOSE BEHIND THIS ACTION.

THE COURT: OKAY. ALL RIGHT. I AM GOING TO TAKE THE MATTER UNDER SUBMISSION. I HAVE GIVEN MORE TIME THAN NORMAL. FORTUNATELY, MY CRIMINAL CALENDAR WAS SHORTER THIS MORNING. AND I HAVE EXTENSIVE NOTES, IN ADDITION TO THE BRIEFS, AND WE'LL PROVIDE A RULING SHORTLY. I'LL TRY TO DO IT WITHIN THE NEXT WEEK OR SO.

MR. SHEPARD: YOUR HONOR, COULD I HAVE ABOUT TWO MINUTES?

THE COURT: I'LL GIVE YOU ONE MINUTE.

MR. SHEPARD: MR. DARMSTADTER SAYS THAT CHIEF JUDGE HUFF DEALT WITH ADMISSIBILITY. I DON'T KNOW ANYTHING ABOUT THAT. IF HE IS INTRODUCING OTHER CASE LAW, I NEED TO KNOW ABOUT IT.

[25] THE COURT: WAS HE TALKING ABOUT GONZALEZ?

MR. DARMSTADTER: I WAS TALKING ABOUT THE *LAUGHLIN* CASE WHICH IS CITED IN

OUR BRIEF. SHE DEALT WITH THE SAME COMPLAINT, THAT THE 4340 HAD BEEN SIGNED BY THE WRONG PERSON AND SHE WENT THROUGH THAT.

MR. SHEPARD: THIS IS NOT A 4340. IT NEVER HAS BEEN.

THE COURT: I UNDERSTAND YOUR ARGUMENT THERE.

MR. SHEPARD: OKAY. WE DID REQUEST AN ACCOUNTING OF THE INTEREST IN DISCOVERY. IF YOU TAKE A LOOK AT MY CLERK'S – THE REQUEST FOR DISCOVERY IS IN THE CLERK'S PAPER 50. AND WE ASKED FOR BASICALLY A CALCULATION OF ALL AMOUNTS. AND WE GOT THE STANDARD, OVERBURDEN SOME, OVERBROAD, VAGUE AND AMBIGUOUS OBJECTION, ATTORNEY WORK PRODUCT, EVEN, SO WE GOT THE BANK RECORDS INSTEAD, NONE OF WHICH HAD ANYTHING TO DO WITH THE INTEREST.

AND I WANT – ONE LAST POINT. THERE HAS GOT TO BE AN ESTOPPEL ARGUMENT HERE ON THE INTEREST, IF NOTHING ELSE. THE GOVERNMENT DECIDED THIS CASE WAS UNCOLLECTABLE. THEY CLOSED THE FILE. AND NOW THEY COME BACK SIX YEARS LATER AND SAY OH, WELL, THE BOYCES DIDN'T PAY. I GUESS THEY NEED TO PAY INTEREST. IF THEY HAD GONE FORWARD AND TRIED TO DO THIS FORECLOSURE BUSINESS IN '95 WHEN THEY SHOULD HAVE, IF THEY WERE GOING TO DO IT AT ALL, WE WOULDN'T BE TALKING THE INTEREST THAT WE ARE TALKING ABOUT.

THE COURT: THANK YOU VERY MUCH.

[26] MR. DARMSTADTER: THANK YOU, YOUR HONOR.

MR. SHEPARD: THANK YOU.

(PROCEEDINGS CONCLUDED AT 11:29 A.M.)

CERTIFICATION

I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT: THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE ON DECEMBER 11, 2000; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: 5/30, 2001, AT SAN DIEGO, CALIFORNIA

/s/ Jeannette N. Hill
JEANNETTE N. HILL,
OFFL. RPTR. CSR NO. 11148

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)
PLAINTIFF,	)
-V-	)
JAMES BOYCE, ET AL.,	)
DEFENDANTS.	)
**********	)

DECLARATION OF JAMES M. BOYCE, Jr.

I, James M. Boyce, Jr., hereby depose and state as follows:

1. That I am a defendant in the case of *USA v. BOYCE, et al.,* CV 99-0003 IEG (POR).

2. That I am over the age of eighteen years, and am competent to testify to the matters contained herein, and if called to testify, would so testify.

3. That on January 20, 1989 the Internal Revenue Service began collection, through levy and distraint, of an alleged tax deficiency relating to James M. Boyce, Jr. and Shelley A. Boyce for the combined years 1979, 1980, 1981, 1982, 1983, and 1984.

4. That the Internal Revenue Service issued continual Notices of Levy on the following Banks for accounts maintained by James & Shelley Boyce:

a. The Bank of America

b. Security Pacific Bank

c. Southwest Bank

d. Chilton Bank of Texas

5. That to the best of my knowledge and recollection the above Banks turned over to the Internal Revenue Service the following amounts, $22,000.00; $17,785.00; $24,835.00; and a few other small amounts, in the hundreds, that I no longer clearly recall.

6. That to the best of my knowledge and recollection the total amount collected by the Internal Revenue Service through Levy and distraint on the above Banks would be approximately $64,620.00.

7. That the Internal Revenue Service issued continual Notices of Levy on the accounts receivable due to James M. Boyce, Jr. from his following customers:

a. Rob Tanner

b. Roper Ranch

c. Dudley White

d. Whispering Palms Realty

8. That to the best of my knowledge and recollection the above customers turned over to the Internal Revenue Service the following amounts, $1,757.00; $2,697.00; $15,087.00; and a few other small amounts, in the hundreds, that I no longer clearly recall.

9. That to the best of my knowledge and recollection the total amount collected by the Internal Revenue Service

through Levy and distraint on the above Customers would be approximately $19,541.00.

10. That the Levies issued to the above Banks and Customers were for collection of taxes for the years 1979, 1980, 1981, 1982, 1983, and 1984.

11. That I never received from the Internal Revenue Service, the above mentioned Banks, or the above mentioned customers any copies of the Notices of Levy for the years 1979, 1980, 1981, 1982, 1983, and 1984.

12. That I never received from the Internal Revenue Service, the above mentioned Banks, or the above mentioned customers any receipts for the monies turned over to the Internal Revenue Service, as a result of the Notices of Levy for the years 1979, 1980, 1981, 1982, 1983, and 1984.

13. That to the best of my knowledge and recollection the Internal Revenue Service has collected, through levy and distraint, in excess of $84,161.00 relating to James M. Boyce, Jr. & Shelley A. Boyce for the years 1979, 1980, 1981, 1982, 1983, and 1984.

14. That our only purpose in this matter, at this point, is to arrive at a fair and reasonable settlement, and finally resolve this matter from our lives, and we have so instructed our attorneys Richard Shepard and Larry Lushanko.

I declare under penalty of perjury, under the laws of the Untied States Title 28 U.S.C. § 1746, that the above statements are true, accurate, and correct to the best of my knowledge and recollection.

Executed this 20 day of January, 2000 at San Diego, California.

/s/ James M. Boyce, Jr.
James M. Boyce, Jr.

DECLARATION OF SHELLY A. BOYCE

I, Shelly A. Boyce, Jr., hereby depose and state as follows:

1. That I am a defendant in the case of *USA v. BOYCE, et al.*, CV 99-0003 IEG (POR).

2. That I am over the age of eighteen years, and am competent to testify to the matters contained herein, and if called to testify, would so testify.

3. That on January 20, 1989 the Internal Revenue Service began collection, through levy and distraint, of an alleged tax deficiency relating to James M. Boyce, Jr. and Shelley A. Boyce for the combined years 1979, 1980, 1981, 1982, 1983, and 1984.

4. That the Internal Revenue Service issued continual Notices of Levy on the following Banks for accounts maintained by James & Shelley Boyce:

a. The Bank of America

b. Security Pacific Bank

c. Southwest Bank

d. Chilton Bank of Texas

5. That to the best of my knowledge and recollection the above Banks turned over to the Internal Revenue

Service the following amounts, $22,000.00; $17,785.00; $24,835.00; and a few other small amounts, in the hundreds, that I no longer clearly recall.

6. That to the best of my knowledge and recollection the total amount collected by the Internal Revenue Service through Levy and distraint on the above Banks would be approximately $64,620.00.

7. That the Internal Revenue Service issued continual Notices of Levy on the accounts receivable due to James M. Boyce, Jr. from his following customers:

a. Rob Tanner

b. Roper Ranch

c. Dudley White

d. Whispering Palms Realty

8. That to the best of my knowledge and recollection the above customers turned over to the Internal Revenue Service the following amounts, $1,757.00; $2,697.00; $15,087.00; and a few other small amounts, in the hundreds, that I no longer clearly recall.

9. That to the best of my knowledge and recollection the total amount collected by the Internal Revenue Service through Levy and distraint on the above Customers would be approximately $19,541.00.

10. That the Levies issued to the above Banks and Customers were for collection of taxes for the years 1979, 1980, 1981, 1982, 1983, and 1984.

11. That I never received from the Internal Revenue Service, the above mentioned Banks, or the above mentioned customers any copies of the Notices of Levy for the years 1979, 1980, 1981, 1982, 1983, and 1984.

12. That I never received from the Internal Revenue Service, the above mentioned Banks, or the above mentioned customers any receipts for the monies turned over to the Internal Revenue Service, as a result of the Notices of Levy for the years 1979, 1980, 1981, 1982, 1983, and 1984.

13. That to the best of my knowledge and recollection the Internal Revenue Service has collected, through levy and distraint, in excess of $84,161.00 relating to James M. Boyce, Jr. & Shelley A. Boyce for the years 1979, 1980, 1981, 1982, 1983, and 1984.

14. That our only purpose in this matter, at this point, is to arrive at a fair and reasonable settlement, and finally resolve this matter from our lives, and we have so instructed our attorneys Richard Shepard and Larry Lushanko.

I declare under penalty of perjury, under the laws of the Untied States Title 28 U.S.C. § 1746, that the above statements are true, accurate, and correct to the best of my knowledge and recollection.

Executed this 20th day of January, 2000 at San Diego, California.

/s/ Shelley A. Boyce
Shelley A. Boyce

DECLARATION OF LEO MASTERS

I, Leo Masters, do hereby depose and declare as follows:

1. That I am over the age of eighteen years and competent to testify to the matters contained herein, and if called would so testify.

2. That I am an active participant in the action entitled *USA V BOYCE,* CV 99-0003 EIG (POR), and am acting in the capacity of investigator for defense counsel Richard Shepard.

3. That Shepard requested I retain local process servers to serve subpoenas upon the following Banks:

Security Pacific National Bank
3730 Bristol Avenue
Santa Ana, California

Southwest Bank
5521 Mission Road
Bonsall, California

Southwest Bank
1025 East Bobier
Vista, California

Security Pacific National Bank
275 S. Valencia Avenue
Brea, California

Southwest Bank
410 S. Melrose Dr.,
Suite 200
Vista, California

Security Pacific National Bank
302 Broadway
Vista, California

4. That I retained Hansen's Guaranteed Process Company, 8607 Imperial Highway, #206 Downey California 90242, to serve the Santa Ana and Brea Branches of Security Pacific National Bank, the servers later called me and informed me that these branches of Security Pacific National Bank had switched to Bank of America five or six years ago, thus the Santa Ana office refused service, however Jennifer Harris at the Brea office accepted

service stating she did not believe any of the requested records existed. (Server declarations attached hereto).

5. That I retained Express Legal Services, 107 S. Coast Highway, Oceanside, California to serve the Bonsall and Vista branches of Southwest Bank, and the Vista branch of the Security Pacific National Bank, service was attempted and the process was returned to me stating "SUBJECT UNKNOWN AT GIVEN ADDRESS." (Server declarations attached hereto)

6. That In further pursuit of the location of these records I was able to determine that Security Pacific National Bank had been taken over by City financial Corporation, and Southwest Bank had been taken over by Commercial Credit Corporation.

7. That I found City Financial Corporation is currently located at 6010 Fairview Road, Charlotte, North Carolina.

8. I contacted City Financial and talked with Jeff Carmichael, Supervisor of Legal Affairs, through the course of our discussion Carmichael informed me that he had been supervisor for the Security Pacific National Bank in Vista, Carmichael further informed and assured me that the records being sought were no longer in existence.

I declare under penalty of perjury that the above statements are true, correct, and accurate.

Executed this 12 day of August, 2000 at Bellflower, California.

/s/ Leo Masters
Leo Masters

SHEPARD LAW OFFICE, INC.
Richard Shepard, WSBA #16194
818 So. Yakima St., #200
Tacoma, WA 98405
(253) 383-2235
Attorney for the Defendants Boyce

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES M. BOYCE and SHELLEY BOYCE, et al., Defendants	Civil No: 99 CV 0003 IEG POR SUPPLEMENTAL DECLARATION OF RICHARD SHEPARD Docket: October 10, 2000 At 10:30 a.m.

DECLARATION

I Richard Shepard, declare under penalty of perjury and pursuant to 28 USC § 1746, the following:

1. Defendants submit the attached documents as exhibits to their various motions filed herewith. A blue sheet divides each exhibit from the others. Although each sheet refers to Defendants' Cross-Motion for Summary Judgment and to Quite [sic] Title, the exhibits apply to all Motions.

2. Exhibit No. 1 is the Declaration of James M. Boyce, Jr., and Shelly A. Boyce.

3. Exhibit No. 2 is a letter of Frank M. Gorman, Attorney at Law, regarding the constitutionality of tax law.

4. Exhibit No. 3 through No. 12 are Freedom of Information Act requests from the defendants to the Internal Revenue Service and responses thereto.

5. Exhibits No. 13 through No. 16 are the defendant's memorandums and other documents laying forth their basis for believing they were not subject to Federal Income tax and filed in connection with United States Tax Court case No. 6979-89.

6. Exhibits No. 17 through 19 are Defendant's requests for technical advice from the Internal Revenue Service made after the tax court decision was entered.

7. Exhibit No. 20 is a copy of a transcript of a June 14, 1993 interview of the Defendants regarding a Summons issued by Mr. Yarbrough.

8. Exhibits No. 21 and No. 22 are copies of portions of the Individual Master Files of Defendants showing relevant Assessment Statute Expiration Dates.

   The Individual Master File (IMF) maintained at the Martinsburg Computing Center is the official record of accounts, in its entirety, of 1040 type taxpayers. The United States Rule 30(b)(6) witness testified that the IMF is also the basis for the herein 4340's (sic). Deposition of James M. Maloney, page 12, lines 21-24. Internal Revenue Manual 30(55)0. ASEDS for James M. Boyce are 1979 – April 15, 1983, 1981 – April 15, 1985, 1983 – April 15, 1987, 1984 – April 15, 1988. ASEDS for Shelley A. Boyce are 1979 – April 15, 1983, 1980 – April 15, 1984, 1981 – April 15, 1985, 1982 – April 15, 1986. Thus, the statute of limitations for collections regarding the listed years expired more than ten years before the United States filed its complaint, January 7, 1999. This is a procedural defect for which Quiet Title under 28 USC 2410 is available.

9. Exhibit No. 23 represents copies of bank transmittals, receipts, and other records related to levies issued by the Government. The circled numbers to the left correspond roughly to paragraph numbers in the Declaration of Gregory Yarbrough. The court's attention is directed to those transmittals that do not have a circled number to the left. The uncircled transmittals represent monies remitted to the IRS for which the IRS has no record.

10. Exhibit No. 24 is a table prepared by the undersigned and his investigator from data entered on the Individual Master Files and the Certificates of Assessments and payments. The grand total of the discrepancies between the Individual Master Files and the Certificates of Assessments and Payments is $539,125.88.

11. Exhibit No. 25 is a table prepared by the undersigned listing interest only from the Certificates of Assessments and Payments. The Court's attention is directed [sic] the dates of entry. In some cases several hundred dollars interest was charged within weeks of an earlier interest entry for the same tax year.

12. Exhibit No. 26 is a table prepared by the undersigned listing entries on the Certificates of Assessments and Payments for James Boyce dated 1999 and not appearing on the Certificates of Assessments and Payments for James Boyce AND Shelly Boyce and dated February 15, 1991. The Courts attention is directed to the dates of entry. The listed entries demonstrate that the IRS will pre-date entries on the Certificates, implying that the entries were made chronologically, when they were not. This is a device of deceit.

DATED THIS 13 Day of August, 2000, at Tacoma, Washington.

/s/ Richard Shepard
RICHARD SHEPARD,
WSBA #16194, for
SHEPARD LAW OFFICE, INC.
Attorney for Defendants Boyce

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN
A CIVIL CASE

Case Number:
3:99-cv-00003

USA – PLAINTIFF

v.

Boyce – DEFENDANT

(Filed Feb. 16, 2001)

__ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the court enters judgment against dft James M. Boyce Jr. aka James Boyce in the amount of $290,761.96 plus interest as provided by the Internal Revenue Code. Judgment is entered against defendant Shelley A. Boyce in the amount of $227,249.98 plus interest as provided by the Internal Revenue Code. The Government's motion for default judgment against defendants Jacob Family Preservation Trust, aka Jacob Family Trust and Northern Plains Service is granted. Judgment is entered against Defendants Jacob Family Preservation Trust, aka Jacob Family Trust and Northern Plains Service. The Government's motion for judgment pursuant to stipulation against defendant White Rail Comapny is granted. Judgment is entered against defendant White Rail Company . . . . . .

2/16/01
Date

Roberta Westdal
Clerk

/s/ M. Gomez
by M. Gomez, Deputy Clerk

Entered on 2/16/01

pre – Lorenz
ref – Porter

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Constitution of the United States of America, First Amendment, provides:

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.

The Constitution of the United States of America, Fifth Amendment, Provides:

AMENDMENT V

> No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in times of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.